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CONTENTS.

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The question as to the power of a State legislature, in the matter of the regulation and establishment of rates to be charged by *quasi* public enterprises, has recently occupied the attention of two courts, viz., the United States Circuit Court for the District of Texas, in certain cases against the railroad commissioners of that State, and the Supreme Court of North Dakota, in State v. Brass. The earlier decisions of the United States Supreme Court, previous to that of what is known as the "Minnesota Granger Case," it was thought, sustained the doctrine that the adjustment of rates to be charged by a railroad company was a legislative prerogative and not a judicial one. In the Minnesota case, however, it was held that the State had not the power, acting through commissioners, to fix rates absolutely and finally without judicial inquiry as to their reasonableness. Whether or not this was in reality a departure from previous decisions of the court, it was an eminently sound and proper conclusion.

Judge McCormick, of the United States Circuit Court, in the case first mentioned, following the Minnesota case, denies the assumed power of a State legislature to regulate rates of freight and fare through the mediumship of a board of railroad commissioners, if by such regulations the rates are made so low that the company cannot pay its own debts. Such regulation is held to be a law impairing the obligation of contracts.

The suits wherein this conclusion was reached were bills for injunctions by the trustees of certain mortgages representing non-residents, seeking to restrain the railroad commissioners from enforcing their arbitrary rates, upon the ground that such enforcement would disable and prevent the companies from meeting the interest on their bonds. The main grounds upon which this relief was asked, were that the tariffs, schedules and orders of the commission, viewed as laws enacted under power delegated by the legislature, were unconstitutional and void because those tariffs were unreasonably low and confiscatory, and that the railroad commission act of the legislature was unconstitutional and void, because it denied to the railroad companies the right to a judicial inquiry in this behalf, thereby denying to the railroad companies, subject to the act, the equal protection of the laws, and subjecting them to conditions under which they were deprived of their property without due process of law.

Judge McCormick held that while the legislature had the power to fix rates, and the extent of judicial interference is protection against unreasonable rates, yet the question of the reasonableness of a rate of charge for transportation by a railway company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation requiring due process of law for its determination, and where the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of a lawful use of its property, and thus in substance of the property itself, without due process of law and in violation of the constitution of the United States; and thus, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits on their invested capital, the company is deprived of the equal protection of the laws. The court further held that the proceedings had by the commission preparatory to the fixing of rates did not constitute due process of law within the meaning of the constitution of the United States, or an investigation by judicial machinery within the meaning of the decisions of the Supreme Court of the United States. It therefore granted the injunction prayed for by the complainants.

In the North Dakota case referred to, an act of the legislature of that State, defining public warehouses and prescribing maximum rates of charges for elevating and storing grain therein, was held constitutional, following Munn v. Illinois, 94 U. S. 113; People v. Budd, 22 N. E. Rep. 670, and Budd v. People, 12 S. C. Rep. 468. It was held further, that inasmuch as the record did not raise the question of the adequacy of the rate of charges fixed by the legislative act, the case was not one which calls for a decision of

the point whether the court would in any case assume to review a rate of charges established by the legislature, where it was shown that such rate was ruinously small or non-compensatory. Chief Justice Corliss concurred with reluctance in the judgment of the court, being of opinion "that the doctrine of the Munn and Budd cases was unsound." He admitted that all authority is in favor of the opinion in this case, but had "an abiding conviction that the dissenting opinions in the Munn and Budd cases embody the true conception of American liberty." We have heretofore expressed the same opinion of the Munn and Budd cases. 30 Cent. L. J. 109.

It will be remembered that the Supreme Court of the United States, in its decision recently rendered in the Budd case, wherein they affirmed the power of the New York legislature to fix rates to be charged by *quasi* public concerns, distinguished the decision of that court in the Minnesota case upon the ground that the latter case had reference only to the establishment of rates by a board of commissioners, and that what was said in the Minnesota case as to the question of reasonableness of the rate of charges being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature, a point which, in our judgment, is of exceeding fineness.

To sum up the whole question, it may be said that the later decisions of the courts seem to have settled the following propositions: First. That a State has absolute power to fix and prescribe rates and charges to be made, not only by railroad companies, but by any business enterprise which for any reason may be said to partake of a public character. Second. That the question of the reasonableness of a rate so fixed by the State legislature is not subject to judicial inquiry. Third. That the power of commissioners with whom is left the fixing of rates and charges by railroad companies within the State is limited in this, that such charges must be reasonable and not in effect confiscatory. Though the doctrine that the legislature may fix rates of charges, ruinous in themselves, which shall be binding without an opportunity for judicial inquiry, has been in terms laid down as to railroad companies, it cannot be said that it has been applied, except inferentially, to other less public enterprises. Therefore there is warrant for the reluctance of the North Dakota court to say what would be its holding if the record had presented a question as to the adequacy of rates.

By way of criticism of the precedents as above stated, it will occur to many that while the property of a railroad company may properly be said to be devoted to a public use and therefore susceptible of reasonable regulation, the same thing cannot be said of elevators or warehouses or other like industries owned by private individuals not having chartered privileges from the State. And the doctrine that the legislature may, of itself, fix rates of charges ruinously low, either for railroad companies or for other business enterprises, which charges shall not be subject to judicial review as to their reasonable character, is dangerous and opposed to the spirit if not the letter of constitutions.

NOTES OF RECENT DECISIONS.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—BANKS—SPECIAL DEPOSIT.—In Mutual Accident Association v. Jacobs, the Supreme Court of Illinois hold that money deposited with a private banker to secure him from liability on a bond, and mingled by him with the other funds of the bank with the knowledge of the depositor, passes to the banker's assignee under a general assignment, and that such deposit, though evidenced by a certificate of deposit, stating the object for which it is made, is a general and not a special deposit. Craig, J., says:

As we understand the question, there is a wide difference between a special and a general deposit, as these terms are understood, not only by bankers, but by the public, who are transacting business daily with banks. Where money of any description is deposited in a bank, and the identical gold or silver or bank bills which were deposited are to be returned to the depositor, and not the equivalent, the deposit will be special, while, on the other hand, a general deposit is "a deposit which is to be returned to the depositor in kind." And. Law Dict. 344; 1 Morse, Banks, § 190; 2 Amer. & Eng. Enc. Law, p. 92; Keen v. Collier, 1 Metc. (Ky.) 417. Where gold or silver coin or a package of bills currency are received in a bank as a special deposit, the identical money to be returned, the bank has no authority to use the money in its business. Its duty is to safely keep and return the identical money. But where there is a general deposit, the understanding being that a like sum of lawful money shall be returned, the bank is permitted to use the money in its general business, and the relation of debtor and creditor is created by the transaction. There is nothing in the certificate of deposit which was issued by Kean & Co. which indicates that a package amounting

to $6,000 had been deposited there to remain for a time and be returned. That was not the transaction; but, as is clearly shown from the evidence, the petitioner gave Kean & Co. a check on another bank, which went through the clearing house, and was paid; and Kean & Co., with the knowledge of the petitioner, mingled the money with the general funds of Kean & Co., in its bank. This $6,000 was commingled with the general funds of the bank in the same manner as money deposited by other depositors. The money thus became the funds of the bank, and, as such, upon the failure of Kean & Co., could not be followed by the petitioner. If the $6,000 had been placed in a separate package, and thus deposited in the bank, and had never been mingled with the general funds of the bank, the position of the petitioner might be sustained; but such was not the case. Otis v. Gross, 96 Ill. 613, is a case where the same principle was involved as here. There moneys had been deposited under an order of court, but had not been kept separate from the general funds of the bank; and it was held that the deposit was not a special one or a mere bailment, but the money deposited became that of the bank. Trustees v. Kirwin, 25 Ill. 73, is a case where the same principle is involved. And in Bank v. Goetz, (Ill. Sup.) 27 N. E. Rep. 909, after referring to the Kirwin Case and various other authorities, it is said: "Many other cases might be cited, but enough has been shown to clearly indicate the line of decisions holding the doctrine that trust funds can only be pursued, when they can be clearly distinguished from other property held by the trustee, or by those representing him, and this court is fully committed to this rule." Wetherwell v. O'Brien (Ill. Sup.), 29 N. E. Rep. 904, is also a case in point. There a deposit had been made with a banker, the intention of the depositor being that the deposit should be invested in a loan on real estate to be procured by the banker, and it was insisted that the money was deposited for a special purpose, and hence a trust for that purpose arose. In the decision of the case it is said: "[Where] the money which is delivered to a bank, even though it be for some specified purpose, as, for instance investment in a mortgage security, has been mingled with the funds of the bank, as was done here, there is no reason why the depositor should be preferred above any other creditor. Where a trustee changes the form of the trust property, the right of the beneficial owner to reach it, and compel its transfer, may still exist, if the property can be identified as a distinct fund, and is not so mixed up with other moneys or property that it can no longer be specifically separated. If the trust property has been transferred to a *bona fide* purchaser for value without notice, or has lost its identity, the beneficial owner must, as under other circumstances he may, resort to the personal liability of the wrong-doing trustee. Citing 2 Pom. Eq. Jur. § 1058. Where a trustee has converted a trust fund into money, and mingled it with his other money so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the fund into the hands of an assignee for the benefit of creditors. Bank v. Smith, 21 Blatchf. 275, 15 Fed. Rep. 858, and cases there cited. Its identification is a prerequisite to the exercise of the right to follow it. 2 Story Eq. Jur. § 1259. While it may not be necessary to point to the particular pieces of money, or the particular bank bills, that were deposited with the trustee, if the trust property be money, yet there must be a preservation of the distinctness of the trust fund." Here the money passed into the bank as a general deposit. It was mingled with other funds deposited in the bank, so that there is no means of separating it from other moneys received by the bank in its usual course of business, and the petitioner occupies the position of a general creditor.

INFANT'S NOTE OR ACCEPTANCE FOR NECESSARIES.

According to some of the old authorities, an infant was liable upon his promise to pay for necessaries. Thus it was held that while he was not liable upon a bond with a penalty for necessaries,[1] he was liable upon a single bill.[2] Comyn lays it down that an *insimul computasset* (account stated) also lies against an infant for necessaries,[3] and cites several authorities, none of which support him. Indeed, it would seem that if an action would lie on a single bill it would also lie upon account stated, but there is a unanimous agreement of the English authorities that it will not. In Tirrill's Case,[4] an infant having a family, bought bread, and afterwards made up an acconnt with the baker, and it was held that he was not chargeable in an assumpsit upon this account, since the law did not allow him such discretion. Again, in Bartlett v. Emery,[5] it was held that an *insimul computasset* would not lie against an infant, even for necessaries, and in Trueman v. Hurst,[6] which was an action on a promissory note with a count upon an account stated, Lord Mansfield said an infant could not bind himself by stating an account, and judgment was given for defendant.[7]

The distinction made by the early cases is wholly illogical and artificial, and the error must have been in Russell v. Lee, for the case of Ayliff v. Archdale, upon which it relies, lays down the proposition in such guarded terms as never to hold the infant upon his mere agreement to pay, even for necessaries. The court in that case, while holding the infant not liable on a bond with a penalty, said only that if the plaintiff had taken merely an obligation of the very sum which he laid out for the infant's necessary maintenance, it had been otherwise.

[1] Ayliff v. Archdale, Cro. Eliz. 920; Coke Litt., 172*a*.
[2] Russell v. Lee, 1 Lev. 86.
[3] Dig., Tit. Infant, B. 5.
[4] 2 Roll. Rep. 271.
[5] 1 D. & E. 42.
[6] 1 T. R. 46.
[7] So held also in Ingledew v. Douglass, 2 Starkie, 36.

The old books are very much given to use the term promise without reference to the actual fact, and in actions of assumpsit, hold as the theory of those actions implied, that the promise was the cause of action, though in many of these cases there was as a matter of fact no promise. Thus in the large class of cases where the plaintiff might waive the tort and sue upon the implied contract in assumpsit, the fiction of a promise as the theoretical basis of the action was indispensable, and also in those cases where the husband is charged for necessaries supplied to his wife, and he is held, though he may have given express notice that he would not be bound, a promise was theoretically the basis of the action, while in all of these cases nothing had, as a matter of fact, been further from the intention of the defendant.

Russell v. Lee was an action of debt. Debt and covenant were concurrent remedies in actions upon instruments under seal, but neither lay upon an implied contract. Both are essentially actions upon an express contract, and if no express contract could be shown, or one was shown which was not binding, the action necessarily failed. When Russell v. Lee was decided, courts were not accustomed to distinguish between those portions of the law which were fictions invented by them, and those which represented or applied to actual states of fact. Both were of equal importance. It is not difficult to believe, then, that the fiction of a promise in the case of an assumpsit was invoked to support an action on a bond, it being shown that the bond was given to cover a liability upon which an assumpsit might have been maintained. That courts should not distinguish between an express and an implied promise at a time when fictions were an essential part of the law is not surprising, but at this day there is no reason, if there was any then, why the courts should not confine themselves strictly to consideration of the real nature of the transaction.

Mr. Chitty doubted whether an infant would, even at this day, be held upon a single bill for necessaries,[8] and he was of opinion that a bill of exchange or note was not available against an infant, either in favor of an indorsee or as between the original parties.[9] It was said *arguendo* by counsel in an early case: "That an infant could not, either by parol contract or deed bind himself even for necessaries in a sum certain; for should an infant promise to give an unreasonable price for necessaries that would not bind him, and therefore it may be said that the contract of an infant for necessaries, *quatenus* a contract, does not bind him any more than his bond would; but only since an infant must live as well as a man, the law gives a reasonable price to those who furnish him with necessaries."[10] If an infant might bind himself on his single bill for necessaries, it would have been impossible to distinguish his promissory note or acceptance, but Lord Mansfield stamped out this notion in an action on a bill of exchange against an infant acceptor. There was a plea of infancy and a replication of necessaries, and Lord Mansfield asked if any one ever heard of an infant being liable as acceptor of a bill of exchange. He said the replication was nonsense.[11] This decision has been much abused, but it seems founded upon the good sense for which that eminent judge was distinguished. The clearness of Lord Mansfield's conception of the question of an infant's liability upon his contract is further shown in Gibbs v. Merrill[12] and Burgess v. Merrill.[13] These were actions upon a bill of exchange which had been accepted by a firm, one of whom was an infant, against the adult acceptor alone. It was argued for the defendant that the acceptance of the infant was valid until avoided by him, and that the cause of action being joint, he should have been joined. Lord Mansfield held that if the infant had been joined the action must have failed, but that the adult could not shield himself behind the infancy of his coacceptor, and the infancy appearing by replication, the action was properly brought against the adult alone. He says: "I never could understand the rule of law that an infant's contract was not void but voidable, The rule that he is liable for necessaries is plain enough, but it does not seem clear in other cases in what manner he is to avoid his con-

[8] Chitty Cont., 33.

[9] Chitty on Bills, 19.

[10] Mitchell v. Reynolds, 10 Mod. 85. This argument is incorporated into the opinion of the court in Beeler v. Young, 1 Bibb, 519.

[11] Williamson v. Watts, 1 Campb. 552.

[12] 3 Taunt. 307.

[13] 4 Taunt. 468.

tract. He may do it, indeed, by plea, but it does not seem necessary that he should do any previous act to avoid it."[14] Again, he observes that the cases which hold that the contracts of infants are voidable only and not void till avoided by the infant, are not intelligible nor reconcilable to common sense. "It is said in some of the cases that the infant may avoid his contract by pleading, that is, he pleads it is not his contract. Now, how is that a contract which does not bind a man? It is inseparable from the idea of a contract that it should be binding."[15]

Early in New Jersey it was held in an action upon a promissory note of an infant, against the infant, that where necessaries were the consideration of the note, or single bill, the ground of action was the providing of the necessaries and not the note or bill, that there was no substantial difference, in common sense, between a bill and a bond with a penalty in this respect, and that, strictly speaking, an action could be maintained on neither.[16] Until 1827 this was universally held to be the law in this country as well as in England.[17]

Judge Reeve,[18] following the argument of counsel in Trueman v. Hurst, was of opinion that the true test of an infant's liability upon any undertaking of his to pay for necessaries was whether the instrument by which he so undertook to pay was of that kind which by the rules of the common law admitted inquiry into the consideration. This was why the infant was not liable on a bond with a penalty, and it was contended that when the law was settled that an infant was liable upon a single bill, the consideration might be inquired into. In like manner it was contended that although the consideration of an *insimul computasset* might, when Judge Reeve wrote, be inquired into, when the law became settled that the infant was not liable upon that undertaking, the consideration could not be inquired into. Upon the same principle it was said that the infant was liable on a non-negotiable note for necessaries, and that even a negotiable instrument given by an infant bound him so long as it remained in such a situation as by the course of the law-merchant, admitted inquiry into the consideration. Thus, in an action by the payee, the infant was bound, since inquiry into the consideration was admissible as between the maker or drawer and payee, but if the note or bill were negotiated, the consideration was no longer open to inquiry and the infant was not bound. The effect of this theory, as is apparent, was to give the plaintiff the benefit of a right of inquiry, never designed for any purpose but for the benefit of the defendant, the exclusion of which by negotiation was never looked upon but as the defendant's misfortune. Nor, if the payee had such right of inquiry, was there any reason why this should not be passed to the indorsee along with every other right connected with the paper which the payee had. As we shall see, the later text writers have not scrupled to take this step.

In South Carolina, in 1827, the Court of Appeals, in Dubose v. Wheddon,[19] criticised Lord Mansfield's summary disposition of the question in Williamson v. Watts as inconsistent with the rule already established, that an infant was liable upon a single bill, overlooking the inconsistency of a contrary holding with the law already established, that an infant was not liable upon an *insimul computasset*. The rule proposed by Judge Reeve, that so long as the instrument was of such a nature or in such a situation as admitted inquiry into the consideration the infant might be bound by it for necessaries, was adopted.

So also in Massachusetts, in 1832, Chief Justice Shaw, in Stone v. Dennison,[20] said that in most of the cases where a minor had not been held on his express contract for necessaries, the consideration, by reason of the form of the action, could not be inquired into, as an action on a bond with a penalty, which implies a consideration, or an *insimul computasset*, where, after the accounting and admission of a balance, no further inquiry into the consideration and terms of the contract can be gone into. These actions, he

[14] Gibbs v. Merrill, 3 Taunt. 307.

[15] Burgess v. Merrill, 4 Taunt. 468. It is remarkable that a judge holding such an opinion should have been the author of the rule that a conveyance of land by an infant, by deed operating under the statute of uses, was voidable merely and not void. See Zouch v. Parsons, 3 Burr. 1794.

[16] Fenton v. White, 1 South'd. 100.

[17] Swasey v. Vanderheyden, 10 Johns. 33; Bouchell v. Clary, 3 Brev. 194; McMinn v. Richards, 6 Yerg. 9; Beeler v. Young, 1 Bibb, 519; McCrillis v. How, 3 N. H. 348; Rainwater v. Durham, 2 Nott & McCord, 524.

[18] Dom. Rel., 4th Ed. 290.

[19] 4 McCord, 221.

[20] 13 Pick. 1.

said, were founded on the assumption that the party has full power to bind himself by any lawful contract, and they only open the question whether he has so bound himself; but where it can always be open to inquiry what the nature and terms of the contract were, and whether the contract was reasonable and beneficial, a minor may be bound by an express as well as by an implied contract for necessaries. This case ignores the proposition that every action upon an express contract, as well as an action on a bond, only opens the question whether the defendant has bound himself, and that it is an entire departure from the conception of such a contract to inquire whether it was reasonable and beneficial. These remarks were probably suggested by the ancient *dictum* of Kean v. Boycott, that those contracts of an infant which are beneficial to him are binding, now, however, long since exploded. In Earle v. Reed,[21] a subsequent case decided by the same judge, the action was upon a promissory note for necessaries. The doctrine that an infant may make an express contract upon which an action will lie was reaffirmed. A distinction was made between an action by the payee and an action by the indorsee against the infant on the note, and it was held that in the former the action would lie, it being competent for the plaintiff to show that it was given for the price of necessaries, upon which he would recover only so much of the note as was given for the necessaries at their fair value, without regard to the price stipulated to be paid by the infant. In an action by the indorsee this inquiry into the consideration could not be had, and the action must therefore fail.

In Vermont, in 1851, the question came before Judge Redfield in the case of Bradley v. Pratt.[22] He said the infant should be enabled to pledge his credit for necessaries to any extent consistent with his safety. He must of necessity make many express contracts with regard to necessaries where he provides for himself, as to the kind of supply, quantity, price and mode of payment, and these agreements may be shown in evidence, although not in any sense conclusive. The court could not see why any express contract by the infant for necessaries may not be said to be binding, where the consideration may be shown and the price agreed upon is reasonable. Judge Redfield thought that but for the necessity of maintaining the unimpeachable character of negotiable paper, the proof of necessaries might also be shown by an indorsee in his action on the note against the infant, but that this probably could not be done without too great an infringement of the rules of law in regard to negotiable paper while current. Judge Redfield seems not to have noticed the distinction that such inquiry between the indorsee and the maker being for the benefit of the indorsee, could not possibly make the circulation of negotiable paper more hazardous.

Since these decisions there has been a tendency to hold the infant liable upon his express contract for necessaries, subject to be reduced to the amount of their actual value.[23] It is, however, held by perhaps a majority of the later cases, that the infant is not liable upon his note or contract as an express contract, even for necessaries.[24] As between the infant and the payee of the note, there is no difference in result between the two classes of cases. It can make no difference to the infant whether he is held upon his express contract reduced to the actual value, or upon an implied contract for the value, but it is of importance to him as to every defendant, that the plaintiff should be required to state the true facts which constitute the cause of action. The one rule requires a statement of the facts as they are, while the other suffers the action to be maintained upon the obsolete fiction of a promise, and not only furnishes no statement of, but misstates the facts. It is not fair to the defendant to force him to his defense upon a fictitious statement of the cause of action, and after having compelled a disclosure of his case, come upon him in the replication for the first time with the true statement of the cause of action. The simple requirements of the code were certainly aimed at any such practice. The practical importance of the rule, however, aside from the question of pleading, lies in its bearing upon the right of an indorsee to show the fact of necessaries and so main-

[21] 10 Metc. 387.
[22] 23 Vt. 378.
[23] Aaron v. Harley, 6 Rich. L. 26; Askey v. Williams, 74 Tex. 294.
[24] Henderson v. Fox, 5 Ind. 489; Ayers v. Burns, 87 Ind. 245; Morton v. Stewart, 5 Ill. App. 533; Parsons v. Keys, 43 Tex. 557.

tain an action against the infant. This right was not claimed by the authors of the rule, but if the indorsee is to be allowed to sue at all, it can only be upon the theory that the infant is liable upon his express contract.

If, as claimed by Judge Reeve, inquiry into the consideration of a single bill was permissible when it was settled that an infant was liable upon a single bill for necessaries, that fact might lend some argumentative force to his theory that an infant could make a contract for necessaries if he was not concluded by its form. Russell v. Lee was, however, the only case which ever held an infant liable upon a single bill for necessaries, and that is, singularly enough, cited by Judge Reeve to show that inquiry into the consideration of a single bill cannot be had. If there ever was a time when such inquiry was permissible, it must have been before Russell v. Lee. There is, however, no reason to suppose that such inquiry was ever permissible. As early as 1808 it was said that the instrument was as rare as statute staple.[25] A single bill was simply a bond without a penalty. It was not the penalty of a bond which made the consideration unimpeachable, but the seal, and that must have had the same effect on a single bill as on a bond with a penalty. There is no authority to show that there was ever any distinction as to the unimpeachable character of the consideration of the two instruments, and no distinction would perhaps have ever been thought of but for the support it might afford to a theory. The truth seems to be, that Judge Reeve and those who have followed him are mistaken as to the reason why an infant was not liable upon a bond with a penalty for necessaries. The penalty of a bond was formerly recoverable, and was supposed to be a just compensation for a failure to pay at the appointed time. To allow the infant to bind himself by a bond with a penalty for necessaries was to allow him to bind himself to pay more than the actual value of the necessaries, and this he could not do.

Judge Story was of opinion that inasmuch as an infant could not bind himself to pay a specific sum he could not execute negotiable paper even for necessaries.[26] The later text writers upon the law of negotiable instruments, however, incline to the opinion that the infant may execute such instruments, and that the payee or indorsee may recover thereupon to the extent of the value of the necessaries.[27] Mr. Daniel criticises the distinction which excludes an indorsee from such recovery on account of the prohibition of inquiry into the consideration as extremely technical and unreasonable. The criticism is just, but it does not follow that the indorsee should recover. Defenses to negotiable paper going merely to the consideration are excluded by negotiation. The rule is intended simply to close the mouth of the defendant. The validity and force of the paper must exist independently of any question as to the consideration, that being imported by the form of the paper itself. It is an entire departure from the conception of negotiable paper that it should depend upon extraneous matter as to its consideration for validity. If such evidence is to be allowed, the character of the consideration is made to inure to the benefit of the plaintiff when to his advantage, though it can never inure to the benefit of the defendant, however advantageous to him it might be to show it.

There seems, therefore, to be no reason upon the authorities, as there certainly is none upon principle, in spite of the great names to the contrary, for a departure from the common sense rule laid down by Lord Mansfield, that it is inseparable from the idea of a contract that it should be binding, that as an infant can never bind himself, but is bound only by operation and construction of law, he cannot make a contract in any proper sense of the term, and that it is wholly immaterial that his attempted contract is for necessaries, or in line with any obligation whatsoever which the law would impose upon him.

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[25] Williamson v. Watts, 1 Campb. 552, note.

[26] Story on Prom. Notes, § 78.

[27] Dan. Neg. Inst., § 226; Tied. Com. Paper, § 48; Sharswood's note to Byles on Bills, 61.

CREDITORS' BILL — JURISDICTION OF FEDERAL COURTS — UNSECURED CREDITOR — STATE STATUTES.

ATLANTA & F. R. CO. V. WESTERN RY. CO. OF ALABAMA.

Circuit Court of Appeals, Fifth Circuit, June 6, 1892.

The circuit court has no jurisdiction of a bill in equity to subject the property of an insolvent corpo-

ration to the payment of a simple contract debt in advance of recovery of a judgment at law, when such debt is unsecured by lien or mortgage, though a State statute authorizes the bringing of such suit by any three creditors of the insolvent corporation.

McCORMICK, CIRCUIT JUDGE: The appellees, corporations, respectively of the States of Alabama, Tennessee and New Jersey, brought this suit in the United States circuit court for the southern district of Georgia against the appellant railroad, a Georgia corporation, and the Central Trust Company of New York, a New York corporation, on three separate simple contract debts not secured by a lien or mortgage, or put in judgment at law, held by the appellees, respectively. They charged that the appellant railroad was insolvent, and was about to put out an issue of second mortgage bonds for purposes and on a scheme that would work an injury to them as unsecured creditors, and they ask for the appointment of a receiver and for an injunction. The bill was presented to one of the judges of the circuit court for the southern district of Georgia, who, after notice to the parties and hearing the the appellant's plea to the jurisdiction of the court, and proof offered, held that the court had jurisdiction and appointed a receiver and granted a preliminary injunction as prayed for in the bill, from which order this appeal is taken, under section 7 of the act creating this court. The bill alleges that the Atlanta & Florida Railroad Company was, at the time the bill was presented, a resident of the southern district of Georgia, and was a corporation duly chartered under the laws of Georgia. The appellant pleaded that it was a resident of the northern district of Georgia, and that it was not a resident of the southern district of Georgia; that it was "a corporation created under the laws of Georgia, and a resident of the county of Fulton, State of Georgia, by reason of the fact that its principal place of business established by its charter is in said Fulton county, which said county is not within the jurisdiction of the circuit court of the United States for the southern district of Georgia."

The appellant filed with his petition of appeal the following assignments of errors:

"(1) That the court erred in holding the plea to the jurisdiction filed by this defendant insufficient, and in overruling the same; (2) that the court erred in holding that the showing made by this defendant against the granting of the injunction was insufficient; (3) that the court erred in holding, upon the facts presented, that the injunction should be granted as prayed for."

The appellant has filed in this court additional assignments of errors, as follows:

"(1) The plea to the jurisdiction set forth on pages 30 and 31 of the transcript should have been sustained because of the residence of the appellant, the Atlanta & Florida Railroad Company in the northern district of Georgia. (2) The court cannot entertain jurisdiction of a suit in equity to subject the property of the defendant company [appellant], in advance of recovery of a judgment at law, to the payment of a simple contract debt, when said debt is not secured by a lien or mortgage, because, under the constitution, the defendant is entitled to a trial by jury. (3) The court erred in granting an injunction to a simple contract creditor without lien or mortgage, and thereby prior to judgment interfering with the possession of the property of the debtor."

In his oral argument counsel for appellant suggests that the errors assigned in this court are only a clearer statement of the errors embraced in the assignment of errors attached to the petition for appeal, and appellees' counsel lay no stress on the matter of the additional assignment of errors filed here. We will therefore treat this additional assignment as a clearer expression of the assignment of errors filed in the court below, and consider the errors assigned as if they had been filed in due time in the circuit court.

It is settled by the decisions of the United States Supreme Court that the appellant, being a corporation created under the laws of Georgia, is, from its creation through its whole period of existence, a citizen of that State; that it is a person within the meaning of the law regulating the institution and conduct of suits, and that it cannot emigrate from the State of its creation; and, being found in Georgia, it may well be taken to be a resident of that State. But whether, like the State government, it resides at every point within the boundaries of the State, or its residence is limited to the places where it does business, or to the place designated in its charter as its principal place of business, must depend on the law, general or particular, giving and governing its life; and if its residence is not co-extensive with the State, an issue of fact arises which requires proof. The record in this case does not disclose what proof was introduced by complainants (appellees). It says:

"Upon the close of testimony for the complainants introduced in the above-stated case, on the hearing of application for appointment of a receiver, and the granting of an injunction in accordance with the prayers of the bill, the defendant, the Atlanta & Florida Railroad Company, introduced in evidence the original charter of the Atlanta & Hawkinsville Railroad Company, of date the 9th of July, 1886, signed by the Hon. Henry D. McDaniel, then governor of the State of Georgia, and attested by N. C. Barnett, secretary of State, by which the principal place of business of said company was fixed at city of Atlanta, in the county of Fulton, in said State. Said defendant also called the attention of the court to the act of the general assembly of 1886, found on page 102 of the Georgia Laws of that year, and the act of the general assembly of the State of Georgia of the year 1887, found on page 238 of the Georgia Laws of that year, by which the name of the Atlanta & Hawkinsville Railroad Company was changed to that of the Atlanta & Florida Rail-

road Company. Upon introducing this testimony the said defendant closed. The court thereupon ruled that it did have jurisdiction of the above-stated bill, and the application for the appointment of a receiver, and the granting of injunction, and did have the jurisdiction to appoint a receiver and grant an injunction, which it then and there did by formal order."

It, however, sufficiently appears from the printed briefs and oral argument of counsel that the appellant railroad is in operation in the southern district of Georgia, and that while Atlanta, which is named in its charter as its principal place of business, is in the northern district, the principal part of its completed and projected road is in the southern district. We have not access to the organic and statute law of the various States, and though we may be charged with judicial knowledge of them, and they do not have to be proved as a fact, it is proper, if not necessary, that counsel should embody in their printed briefs, or append thereto, exact copies of the provisions of the State laws on which they rely, or to which they refer in argument. We find it stated in the brief of appellant's counsel that Code Ga. § 3402, provides that "all civil cases in law shall be tried in the county wherein the defendant resides," and that section 4183 provides that "all bills shall be filed in the county where (?) the residence of one of the defendants against whom a substantial relief is prayed," and that "the constitution of Georgia in section 16, par. 3, is in the same language as contained in the foregoing section 4183. Paragraph 6, same section of the constiiution of Georgia, is the same as contained in section of Code 3402." From the same brief we quote that Code Ga. § 3406, provides:

"All railroad companies shall be liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, their officers, agents, or employees, for the purpose of recovering damages for such injury, and also on all contracts (made or) to be performed in the county wherein the suit is brought."

This provision of the Code of Georgia the supreme court of that State has declared to be not in violation of the constitution. Railroad, etc., Co. v. Oaks, 52 Ga. 410. And the argument seems to have force that when the constitution provides that suit can only be brought in the county of the defendant's residence, and a constitutional law says that a railroad may be sued on some causes of action in any county where it inflicts an injury, or makes or agrees to perform a contract, that this law must give the railroad a residence in each county where any one of these things is done. And if, for any purpose, the appellant by the laws of Georgia can be sued on certain causes of action in some one of the counties in the southern district of Georgia, it can only be because, by the constitution and laws of Georgia, it has a residence in the said district as well as in the northern district, where its principal place of business is fixed by its charter. And if it has a residence, for any purpose, at any point within the southern district of Georgia, its liability to suit in the national courts in that district cannot be limited by the State law qualifying its liability to suit in the State courts, but must be determined by the national law fixing the place where suits may be brought in the national courts.

We say this argument seems to have force. But in view of the fact that this is an appeal from an interlocutory decree granting an injunction, and the further fact that the proof introduced by the appellees is wholly omitted from the record, we would hesitate to decide the question raised by this assignment of error, even if our view of the second assignment did not render it unnecessary for us to announce more definitely on this first assignment. Can the circuit court entertain jurisdiction of a suit in equity to subject the property of appellant, in advance of recovery of a judgment at law, to the payment of a simple contract debt, when said debt is not secured by a lien or mortgage? It will be found that the case Terry v. Anderson, 95 U. S. 628, cited by appellee, by no means answers this question in the affirmative. The bill in that case was against the trustees and stockholders to enforce against the stockholders of the insolvent bank the liability of said stockholders for the unredeemed bills of the bank, some of which bills complainants held. Demurrers, not distinctly raising the question we are considering, were sustained, and the bill dismissed, and, in delivering the opinion of the court affirming the decree of the circuit court, Chief Justice Waite says:

"The complainants are neither of them judgment creditors of the bank. In a suit instituted by the assignees to close up the assignment, they proved their claims, and the amount due them was found for the purposes of a division. The finding was sufficient for the purposes of distribution, but it has none of the characteristics of a judgment or decree, to be enforced as against anything but the fund which the court was then administering." At a subsequent day of the term, in overruling a petition for rehearing, he used the language quoted in the brief of appellee's counsel:

"Ordinarily a creditor must put his demand into judgment against his debtor, and exhaust his remedies at law, before he can proceed in equity to subject choses in action to its payment. To this rule there are, however, some exceptions, and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity, the principle being that equity will not permit a trust to fail for want of a trustee."

The case of Graham v. Railroad Co., 102 U. S. 148, cited by appellees, was a bill by judgment creditors of the railroad to subject certain lands

alleged to have been fraudulently obtained from the railroad to the payment of complainants judgments. The bill was dismissed on demurrer. The question we are now considering was not in the case, and the concluding paragraph of Judge Bradley's opinion quoted by appellee's counsel, does not touch the question as to the appellees here being proper parties to bring the bill they have exhibited against appellants.

Appellees' counsel quotes the second paragraph of the syllabus in the report of the case of Mellen v. Iron Works, 131 U. S. 353, 9 Sup. Ct. Rep. 781, which appears to sustain the contention of appellees. In the body of the opinion we note this language:

"It is, however, contended that the furnace company could not rightfully invoke the aid of a court of equity to remove this lien or incumbrance until it had, by obtaining judgment for its debt and suing out its execution, exhausted its legal remedies. Jones v. Green, 1 Wall. 330; Van Weel v. Winston, 115 U. S. 228, 245, 6 Sup. Ct. Rep. 22. But that was one of the questions necessary to be determined in the suit brought by that company, and any error in deciding it would not authorize even the same court, in an original independent suit, to treat the decree as void. * * * In the view we take of the case, it is not necessary to determine the soundness of any of these propositions; for, if the court erroneously ruled upon any of them, its decree could not for that reason be assailed in a collateral proceeding as void for want of jurisdiction."

And we take it that the supreme court in this case expressly did not decide the question we are now considering. We understood counsel for appellees to say in his oral argument that this bill was exhibited in strict conformity with a statute of Georgia which provided that, in cases of insolvent corporations, any three creditors might sue for the relief these appellees seek. We have not been furnished a reference to the section of the statute, and we have not been able to find it in the edition of the Code we have examined; but, assuming that we correctly understood counsel, we suggest that, to make such statute applicable to the circuit court, each of the three creditors required must be a creditor to an amount exceeding $2,000, while one of these appellees exhibits a claim of only $236.72. But we are of the opinion that the statute referred to cannot aid the jurisdiction of the circuit court.

In the case of Scott v. Neely, 140 U. S. 166, 11 Sup. Ct. Rep. 712, a statute of Mississippi, which authorized creditors in advance of judgment to sue for the relief sought in that case, was greatly relied on to support the jurisdiction; but the supreme court, through Mr. Justice Field, in announcing their decision, say:

"Whatever control the State may exercise over proceedings in its own courts, such a union of legal and equitable relief in the same action is not allowed in the practice of the federal courts."

And after a very thorough and critical discussion of the question the opinion concludes: "It follows from the views expressed that the court below could not take jurisdiction of this suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief." And so we must say in this case. Therefore the decree granting the injunction must be reversed, and the injunction dissolved; and it is so ordered.

NOTE.—The right of the complainants in this case seems to have been rested on the Georgia statute, and in this view the decision may be sustained; but the right of corporate creditors to proceed in equity to protect and subject the assets of an insolvent corporation in certain cases, without reducing their claims to judgment, seems to be well settled in principle and authority, independent of statutory provisions. The right to thus proceed is based on the trust character of the corporate assets and the lien of the creditors, both of which are peculiarly the subjects of general equity jurisdiction. The general proposition that a creditor, before he can proceed in equity, must exhaust his legal remedies, is conceded, but, as is very clearly shown in the opinion of Mr. Justice Strong in Case v. Beauregard, from which I quote, this general rule has no application where the creditor is a *cestui que trust*, or has a lien recognized by the court of equity, provided he shows some ground for equitable interference, which the bill in the principal case fails to do. When a court of equity will interfere at the instance of a creditor at large is clearly stated in 2 Mor. on Corp., § 799:

1. The capital stock and assets of a corporation constitute a trust fund pledged for the benefit of creditors, which neither the officers nor stockholders can divert or waste. 2 Story Eq. Jur. § 1252; Wood v. Dummer, 3 Mason, 308; Sawyer v. Hoag, 17 Wall. 610; Sanger v. Upton, 91 U. S. 60; Upton v. Tribilcock, 91 U. S. 47; Scovill v. Thayer, 105 U. S. 150; 2 Mor. on Corp. § 780 *et seq.* This principle, which was first declared in Wood v. Dummer, *supra*, has long been recognized in this State, as elsewhere, and repeatedly affirmed. Bank of St. Mary's v. St. John, 25 Ala. 610; Smith v. Huckabee, 53 Ala. 191; Montgomery, etc. R. R. v. Branch, 59 Ala. 539; Elyton Land Co. v. Birmingham Co., 92 Ala. 407.

2. Following this principle, the lien of creditors on this trust fund is recognized in equity and the authorities are numerous that a corporate creditor, without judgment, may come into a court of equity, upon the insolvency or dissolution of the corporation, to protect this trust fund thus pledged from waste or diversion and enforce his lien. 2 Mor. on Corp. §§ 797, 798; 2 Story Eq. § 1252*a*; Perry on Trusts, § 242; Bank of St. Mary's v. St. John, 25 Ala. 566, 618; Conro v. Gray, 4 How. Pr. 166; Coal Mining Co. v. Edwards, 103 Ill. 472; Evans v. Coventry, 1 D. M. & G. 910; Kearns v. Leaf, 1 H. & M. 707; *Re* State Fire Ins. Co., 1 H. & M. 466; Sanger v. Upton, 91 U. S. 60; Beach on Receivers, 416. Dr. Pomeroy, speaking of the legal *status* of the property of corporations and partnerships after dissolution or insolvency, says "that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of the individual partners or corporators, and that the creditors have a lien upon it for their own security" (2 Pom. Eq. § 1046); but, he adds, it is plain that no constructive trust can arise unless the directors have placed the assets "beyond the reach of creditors through ordinary legal means."

Id.; 2 Mor. Corp. § 799. This trust and the lien of creditors is expressly recognized and declared in Sanger v. Upton, *supra*. The case of Bank of St. Mary's v. St. John, *supra*, decided in 1854, is instructive. That was a bill filed by a creditor at large to subject the assets of an insolvent corporation and to recover from certain directors corporate assets alleged to have been wrongly misappropriated by them. There was then in force in Alabama an act passed in 1846, authorizing creditors, without obtaining judgment, to proceed in equity to subject property fraudulently conveyed, but the court, in delivering the opinion in that case, do not rest the right of the plaintiffs on the statute, but assert it on independent grounds. "It is also clear," says the court, p. 619, "that as to the creditors, these directors and agents are trustees, and as such liable to account with them for such sums as may have been lost by their mismanagement, or misapplied by themselves; and in this respect the chancery court may afford relief independent of the act of 1846." To the same effect, Taylor on Corp., § 654 *et seq.*

3. This right of the creditors at large of a corporation to proceed in equity is in strict analogy to the right of a creditor of a partnership, and is based upon the same principles of equity. Mr. Morawetz, after declaring the rule as stated in reference to corporate creditors, says: "Similar equitable relief will for the same reasons be granted to creditors of a limited partnership, or of a joint stock company whose capital has been equitably pledged as a fund for the security of creditors." 2 Mor. on Corp. § 798. And for this proposition the learned author cites the opinion of Chancellor Walworth in Innes v. Lansing, 7 Paige Ch. 783, which was the case of a limited partnership. In Holt v. Bancroft, 30 Ala. 193, 204, the right of a partnership creditor to come into equity without first exhausting his legal remedies is expressly decided. In Case v. Beauregard, 101 U. S. 688, a creditor at large of a partnership filed a bill to subject firm assets to his debt; on the hearing his bill was dismissed. He then filed a second bill for the same cause of action, alleging, in addition to the matters set forth in the former bill, the recovery of a judgment, the issue of an execution and return of *nulla bona*. It was held that the former decree was as *res adjudicata* a bar to the second suit. The case necessarily involved the determination of the question whether on the first bill the creditor could have had relief or not, and the court sustained the proposition that he could. In the opinion of the court, Mr. Justice Strong discusses learnedly and at length the reason of the rule requiring creditors to exhaust their legal remedies before seeking the aid of a court of equity. He says, p. 690: "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly, the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, "*Bona sed impossibilia non cogit lex.*" It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. Turner v. Adams, 46 Mo. 95; Postlewait, Creagin & Kelly v. Howes, 3 Iowa, 365; Ticonic Bank v. Harvey, 16 *Id.* 141; Botsford v. Biers, 11 Conn. 369; Payne v. Sheldon, 63 Barb. (N. Y.) 161. This is certainly true where the creditor has a lien or trust in his favor." Again, says the court, p. 691: "But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon the property for debt due him, he may go into equity without exhausting legal processes or remedies, citing Tappen v. Evans, 11 N. H. 311; Holt v. Bancroft, 30 Ala. 193. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien either by judgment or execution. But when the bill asserts a lien or a trust, and shows it can be made available by the aid of a chancellor, it obviously makes a case for his interference." The trust and lien being established, the jurisdiction of a court of equity to entertain a bill filed by a creditor at large to protect and subject the trust fund follows, and while I do not question the soundness of the decision of the principal case on the facts there, the opinion, in so far as it undertakes to declare that a creditor of an insolvent corporation, without a contract lien, cannot go into a court of equity to subject corporate assets to the satisfaction of his debt, unless he has reduced his claim to judgment, states the rule too broadly and seems to disregard a well-settled exception.

Birmingham, Ala. ALEX. T. LONDON.

BOOK REVIEWS.

HINTS ON ADVOCACY,

The ninth edition of which has recently come from the press of the CENTRAL LAW JOURNAL, has proven a valuable addition to the law literature of the country. As its title indicates, the work is devoted entirely to suggestions as to the conduct of cases, civil and criminal, and a careful perusal of its pages warrants the assertion that the author, Richard Harris, has a thorough knowledge of the minutiæ and details of the preliminaries incident to a proceeding in court, and comprehends fully the requirements necessary to bring about a successful result after the question has become one for the determination of a jury. The style of the work will commend it to the reader. It is bright, earnest, crisp and entertaining, and utterly devoid of the dullness and dryness which are the almost invariable characteristics of legal publications. The author evidently addresses himself to the student and young practitioner, but his words contain much in the way of advice that even the oldest of the profession may find timely and instructive. The chapter descriptive of the classes of witnesses met with in courts of justice displays a knowledge of human nature and a keen appreciation of the value of prudence in eliciting their testimony and emphasizing the more important and salient features of it. Of unusual interest and value to the student will be found the chapter devoted to illustrative cases, where Mr. Harris shows himself to be a master of logic, an incisive investigator and an intelligent and competent instructor in that most difficult feature of a legal procedure—the cross-examination of a witness.

The fact that Hints on Advocacy has passed through eight editions attests the popularity of the work. There is not a dull line in its 307 pages, while there is a wealth of information without which no lawyer,

old or young, may hope to attain fame and reputation in his profession. Typographically the book is a handsome volume, printed from clean, clear type, and presented in a shape to make it an ornament to any library. No reader of legal fiction, no student of the science of law, no practitioner should be without it.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTIONS — Consolidation.—It is not an abuse of judicial discretion to consolidate two actions,—one to recover for services, and the other for breach of contract of sale.—GRANT V. DAVIS, Ind., 31 N. E. Rep. 587.

2. ADMINISTRATION — Claims against Estate.—The claim of an attorney compromising and reducing a claim against an estate, such service being rendered several years after intestate's death, solely on a contract with administratrix, is not a claim against the estate.—LUSK V. PATTERSON, Colo., 30 Pac. Rep. 253.

3. ANIMALS — Trespassing.—Unless the owner of a mule has knowledge of a propensity on its part to attack colts, he is not liable for a colt killed by it while running at large.—MEEGAN V. MCKAY, Okla., 30 Pac. Rep. 232.

4. APPEAL—Bill of Exceptions.—Since Rev. St. 1881, § 1410, provides that the long-hand manuscript of the evidence, to be preserved in the record, must be incorporated bodily into a bill of exceptions, it is insufficient to merely refer in a bill of exceptions to the page and line of an uncertified transcript of the evidence, where the testimony of witnesses and contracts read in evidence may be found.—LAUDERBACK V. ROUCH, Ind., 31 N. E. Rep. 578.

5. APPEAL—Bill of Exceptions.—Under Rev. St. 1881, § 629, which requires that, "the date of the presentation shall be stated in the bill of exceptions," a bill of exceptions filed after the time allowed therefor is not made part of the record by an indorsement made on it by the judge showing the bill was presented to him during the time allowed for filing.—PLOTZ V. FRIEND, Ind., 31 N. E. Rep. 587.

6. APPEAL—Review.—Where there is evidence tending to show that plaintiff has sustained some damage, a judgment in his favor will not be reversed by the supreme court on the ground that the amount of the judgment is excessive, since the measure of damages is a question of fact upon which, under the practice act, the decision of the Illinois Appellate Court is final.—OHIO & M. RY. CO. V. COMBS, Ill., 31 N. E. Rep. 598.

7. APPEALABLE ORDERS.—Where the superior court has jurisdiction of the cause of action and of the parties, a plea to a transitory action that the writ was brought in the wrong county is not a plea to the jurisdiction, but a plea in abatement; and, as provided by Pub. St. ch. 152, § 10, and *Id.* ch. 153, § 8, the decision of a justice of the superior court thereon is final, whether a question of law or fact.—GUILD V. BONNEMORT, Mass., 31 N. E. Rep. 647.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Hill's Code, § 3180, requires the court to "order the assignee to make, from time to time, fair and equal dividends among the creditors of the assets in his hands in proportion to their claims:" Held, that a creditor is entitled to the dividend from the assignee, though his claim against the insolvent may be secured collaterally.—KELLOGG V. MILLER, Oreg., 30 Pac. Rep. 229.

9. CARRIERS—Negligence—Defective Premises.—In an action for personal injury caused by a defective approach to a boat landing, evidence that subsequent to the injury defendant repaired the defect is competent, not for the purpose of showing antecedent negligence, but to show ownership of or control over the premises.—SKOTTOWE V. OREGON S. L. & U. N. RY. CO., Oreg., 30 Pac. Rep. 222.

10. CARRIERS — Passengers — Hauling Circus Cars.—Where a railroad company makes a special contract with circus proprietors to haul their cars for a gross sum the proprietors to load and unload, assume all risk of accident, and save the company harmless, the relation of the company to an employee of the circus, who travels on the train under such contract, is not that of a common carrier, and it is not obliged to inspect the trucks of the cars, and it is therefore not liable for an injury to such employee arising from a defective car truck, which inspection would have revealed.—ROBERTSON V. OLD COLONY R. CO., Mass., 31 N. E. Rep. 650.

11. CROWDING AT STATIONS — Negligence.—Where a railroad company, by means of advertisements and reduced rates, induces an unusual crowd to collect at its stations, it is bound to use such means as are reasonably necessary to prevent injury to individuals from the conduct or pressure of the crowd in passing to and from its trains.—TAYLOR V. PENNSYLVANIA CO., U. S. C. C. (Ohio), 50 Fed. Rep. 755.

12. CARRIERS OF PASSENGERS—Limiting Liability.—A contract whereby a passenger, in consideration of being allowed by a railroad company to ride in the baggage car, agrees to "assume all risk of accidents and injuries resulting therefrom, and hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding," relieves the company from liability to the passenger for injuries received by him while so riding, though his being in the baggage car did not contribute to the injury.—HOSMER V. OLD COLONY R. CO., Mass., 31 N. E. Rep. 652.

13. CARRIERS OF PASSENGERS — Reasonable Regulations.—In an action against a railroad company by plaintiff to recover damages, where a gateman refused to allow plaintiff to pass to a train because the date on his ticket was illegible, whereby he lost the train, plaintiff is not obliged to present his ticket to a ticket receiver if in the same condition as when received from defendant's agent, such a rule of the company being unreasonable. — NORTHERN CENT. RY. CO. V. O'CONNER, Md., 24 Atl. Rep. 449.

14. CITY COUNCIL.—The provisions of a city charter declaring that the mayor may call special meetings of the council "by causing notice to be left at the usual residence of each member" of the council, does not

prevent personal notice to the members.—RUSSELL V. WELLINGTON, Mass., 31 N. E. Rep. 630.

15. CONSTITUTIONAL LAW — Condemnation for Street Purposes.—Where land is appropriated for a street improvement, an assessment by the front foot of the property bounding and abutting upon the improvement, to pay the cost thereof, without the passage, notice, and publication of such preliminary resolution, as thus provided, will not thereby be a a taking of property without due process of law, in violation of section 1 of the fourteenth amendment of the constitution of the United States.—CALDWELL V. VILLAGE OF CARTHAGE, Ohio, 31 N. E. Rep. 602.

16. CONSTITUTIONAL LAW—Railroad Rates.—Where a tariff of freight and passenger rates has been established by the railroad commissioners, and a railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the subject, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs as fixed by the commission must, in so far as the courts are concerned, be left to the test of experiment.—STORRS V. PENSACOLA & A. RY. CO., Fla., 11 South. Rep. 226.

17. CONSTITUTIONAL LAW — Special Legislation.—The supplement to an act entitled "An act for the construction, maintenance, and operation of systems of sewerage in cities, towns, and boroughs," approved June 18, 1890, which supplement was approved April 16, 1891, is obnoxious to the constitutional provision prohibiting special legislation respecting municipalities.—STATE V. CITY OF PLAINFIELD, N. J., 24 Atl. Rep. 494.

18. CONTRACT—Damages.—For the breach of an executory contract to excavate foundations by abandonment thereof by the employer, the general damages are measured by subtracting the actual cost thereof from the contract price.—RICHTER V. MEYER, Ind., 31 N. E. Rep. 582.

19. CONTRACT — Performance — Quantum Meruit.—Where plaintiff and his wife agreed to perform certain services for defendant for a specified consideration, and did perform them until the death of the wife, which event rendered the full performance of the contract impossible, and defendant thereupon annulled the contract, plaintiff can recover what the services rendered are reasonably worth.—PARKER V. MACOMBER, R. I., 24 Atl. Rep. 464.

20. CONTRACT OF EMPLOYMENT—Evidence.—Plaintiff, manager of defendant's store, was discharged before the expiration of the term of employment, and in an action for full compensation defendant sought to justify the discharge by showing that in conducting the business plaintiff had driven away patrons: Held, that persons who had ceased to deal there could not testify they did so because of plaintiff's conduct.—MORRIS MIN. & MANUF'G. CO. V. KNOX, Ala., 11 South. Rep. 207.

21. CONTRACTS OF INFANT — Ratification.—A marked distinction exists between the ratification of executed and executory contracts. When the contract remains in part unexecuted, a mere acknowledgment of the debt, or payment of interest or part of the principal, by the infant, after becoming of age, is not a binding legal affirmance. No new consideration is required, but where language is relied on to show ratification, while it may be either oral or written, and while it need follow no particular form, it must be voluntarily and understandingly used, and must indicate an intention to pay the debt.—KENDRICK V. NIESZ, Colo., 30 Pac. Rep. 245.

22. CORPORATIONS—Liability of Stockholders.—A distinction is drawn between one who holds his stock by transfer and an original subscriber. The former may, in the absence of any fraudulent purpose, discharge himself from liability for unpaid installments by due transfer of his shares; while the latter cannot obtain immunity in that way. The subscription to the stock, and the acceptance of a certificate for the shares, constitutes a contract between the subscriber and the company, by which the subscriber engages to pay the remaining installments on demand by the corporation. From this agreement the subscriber cannot recede without the consent of the company.—HOOD V. MCNAUGHTON, N. J., 24 Atl. Rep. 497.

23. CORPORATIONS — Officers.—Pub. St. ch. 106, § 60, provides that the officers of a corporation shall be "jointly and severally liable," when the debts of the corporation exceed the capital, to the extent of such excess existing when suit is commenced against the corporation: Held, that an indebtedness of a corporation to one of its directors constitutes a debt due within the statute, and the extent of such indebtedness cannot be determined on the principle of mutual credits, but is fixed by the full amount of the debt due in its popular and ordinary legal sense.—THACHER V. KING, Mass., 31 N. E. Rep. 648.

24. CORPORATIONS—Officers — Dividends.—A court of equity has power, at the suit of a minority of the stockholders of a corporation, to order a dividend of its assets where the safety of the interest of the minority requires it.—FOUGERAY V. CORE, N. J., 24 Atl. Rep. 499.

25. COUNTY COMMISSIONER — Authority to Employ Physician.—Under Rev. St. 1881, § 5764, which makes it the duty of the county commissioners to employ physicians for the poor, but authorizes the overseers of the poor in townships not otherwise provided for to employ such medical or surgical services as paupers within their jurisdiction may require, the overseer of the poor may, at the county's expense, employ a physician to treat a pauper in urgent need of medical aid where the regular county physician refuses to take the case.—BOARD OF COM'RS OF PERRY COUNTY V. LAMAX, Ind., 31 N. E. Rep. 584.

26. COURTS—De Facto Judge.—Where one holds possession of a judicial office under a certificate of election duly issued by the secretary of State he is entitled to the compensation incident to the office; and the fact that a contest of the election is pending cannot be set up as a defense in a proceeding by *mandamus* to compel payment of the salary.—HENDERSON V. GLYNN, Colo., 30 Pac. Rep. 266.

27. COURTS—Jurisdiction.—One circuit court has not jurisdiction of an action to annul a judgment of another circuit court, and enjoin execution thereon, though the judgment creditor had agreed for a consideration to allow the judgment to be set aside, and permit a judgment for the judgment debtor; and it is immaterial that, within the territorial jurisdiction of the first circuit, plaintiff has land on his title to which the execution casts a cloud.—BLACK V. PLUNKETT, Ind., 31 N. E. Rep. 567.

28. CRIMINAL LAW—Evidence.—By Code, § 4286, the evidence of witnesses examined on a preliminary investigation must be reduced to writing by the magistrate, or under his direction, and signed by the witnesses, respectively: Held, that evidence so taken is, in the absence of the witness, the best evidence of what he swore, and cannot be varied or contradicted by the magistrate's statements from his recollection of the witness' testimony.—MATTHEWS V. STATE, Ala., 11 South. Rep. 203.

29. CRIMINAL LAW—Felonies—A crime is not a felony unless so declared by statute, or it was such at the common law.—STATE V. MURPHY, R. I., 24 Atl. Rep. 473.

30. CRIMINAL LAW — Murder.—Code, § 3725, declares that "every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing, is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree:" Held, that an indictment which charged that defendant unlawfully and with malice aforethought, "but without deliberation or premeditation, did kill," etc., charged murder in the second degree.—WARD V. STATE, Ala., 11 South. Rep. 217.

31. CRIMINAL LAW—Murder—Instructions.—It is error to instruct the jury that "if they shall believe from the evidence, beyond a reasonable doubt, that the killing has been proven as charged, then any defense which defendant may rely upon in justification or excuse of the act, or to reduce the killing to the grade of manslaughter, it is incumbent on the defendant to satisfactorily establish, unless the proof thereof arises out of the evidence produced against him," since such instruction deprives defendant of the benefit of any reasonable doubt as to the grade of the offense.—SMITH V. PEOPLE, Ill., 31 N. E. Rep. 599.

32. CRIMINAL LAW—Subornation of Perjury.—Where a person procures another by persuasion or threats to knowingly make a false affidavit before a justice of the peace, for the purpose of having a third person charged and arrested for a criminal offense under the statutes of the State, and such false affidavit and the testimony therein are material in the cause or proceeding before the justice, such persuading, procuring, or compelling the false affidavit to be made is guilty of subornation of perjury.—STATE V. GEER, Kan., 30 Pac. Rep. 236.

33. CRIMINAL PRACTICE—Bribery.—Under Pub. St. ch. 205, § 9 which makes it a crime to bribe "any executive, legislative, or judicial officer," an indictment for a attempted bribery of a milk inspector is sufficient which sets out all necessary facts in relation to his official position, though it does not set forth in terms that he was an executive officer.—COMMONWEALTH V. LAPHAM, Mass., 31 N. E. Rep. 638.

34. CRIMINAL TRIAL—Competency of Juror.—A person tendered as a juror in a criminal case is not incompetent by reason of his having expressed an opinion, where he states upon his *voir dire* that he knows nothing as to the facts, is not conscious of any bias, and believes he can render a verdict according to the evidence.—STATE V. SUMMERS, S. Car., 15 S. E. Rep. 369.

35. CRIMINAL TRIAL—Evidence of Absent Witness.—In order to introduce on the trial evidence given by an absent witness at a preliminary examination it is necessary to prove that he has gone beyond the State permanently or for an indefinite time; that a subpœna was issued and an effort made to find him; and that he is without the jurisdiction of the State.—LUCAS V. STATE, Ala., 11 South. Rep. 216.

36. DEDICATION — Evidence of Intent.—Common-law dedications, when a prescriptive right has not attached rest upon the actual intent of the owner of the property. This intent is to be established, as any other fact, by evidence. It must clearly appear; but no particular formality is required, nor is any unusual limitation placed upon the kind of proof to be received.—CITY OF DENVER V. JACOBSON, Colo., 30 Pac. Rep. 246.

37. DEED—Cancellation—Undue Influence.—In an action to set aside a deed, made by a father in his dotage to his youngest son, held, that the testimony tended to show undue influence on the part of the son, and that the father was not in a mental condition to transact important business.—LODER V. LODER, Neb., 52 N. W. Rep. 814.

38. DEED—Delivery.—Grantors, who executed a conveyance of lands under an agreement with the grantee that delivery thereof should be subject to the execution of a mortgage securing part of the purchase price, and left it with him to remain in his desk till such execution, thereby effected a delivery passing the title absolutely to the grantee.—RICHMOND V. MORFORD, Wash., 30 Pac. Rep. 241.

39. DRAINAGE—Jury Trial.—On an appeal from the commissioners' court to the circuit court, in a proceeding to establish a drain, either party is entitled to a trial by jury.—BACHELOR V. COLE, Ind., 31 N. E. Rep. 569.

40. EASEMENT—Adjoining Land-owners.—A right in the nature of an easement may be created in favor of the owners of one of two adjoining tracts, and a correlative duty may be imposed on the owners of the tract to have the latter perpetually maintain the whole or a part of the division fence.—CASTNER V. RIEGEL, N. J., 24 Atl. Rep. 484.

41. EJECTMENT—Possession.—If two owners in severalty of adjoining tracts by mutual consent inclose them by a fence around the exterior boundaries of both the inclosure constitutes possession by each of the tract claimed by him, as against a mere intruder who brings ejectment; and it is immaterial whether the land is public or private.—REAY V. BUTLER, Cal., 30 Pac. Rep. 208.

42. ELECTIONS AND VOTERS—Constitutional Law.—The right to vote, secured by the constitution, can only become operative by legislation; and any reasonable legislative regulation for the purpose of securing an enforced secrecy of the ballot is not a deprivation of a right to vote.—STATE V. BLACK, N. J., 24 Atl. Rep. 489.

43. EMINENT DOMAIN—Possession Pending Litigation. The power conferred by Code Civil Proc. § 957, providing that when a judgment is reversed the appellate court may make complete restitution of all property and rights lost by the judgment, so far as such restitution is consistent, etc., is discretionary, and where, after an appeal by the land-owner from a judgment of damages in condemnation proceedings, the court allows plaintiff to take possession of the land, and occupy it pending the litigation, as authorized by Code Civil Proc. § 1254, on the payment into court of a sum in addition to the judgment, the supreme court, on reversing the judgment and remanding the cause for a new trial as to the amount of damages only, will not put the land-owner back into possession unless the circumstances render it just and necessary.—SPRING VALLEY WATER WORKS V. DRINKHOUSE, Cal., 30 Pac. Rep. 218.

44. EQUITY PRACTICE—Amendment.—A bill framed on the theory that a trust expired at a certain time, and asking for an account of the trust estate in the hands of the trustees, cannot, after a decision that it had not expired, and that so long as it continued the *cestui que trust*, testator's widow, was entitled to the annuity provided, be amended so as to seek to have complainants' claims as creditors of testator decreed a lien on the property, subject, at most, to the widow's claim of dower, and to have the property sold and divided, the effect of such amendment being to make a new and different case.—NATIONAL BANK OF COMMERCE V. SMITH, R. I., 24 Atl. Rep. 469.

45. EXECUTION—Payment into Court—Exemptions.—In an action to enjoin an execution upon the ground that the judgment debtor had been garnished in a proceeding after judgment, and had paid the amount owing the judgment creditor into court in pursuance of its orders, the judgment creditor was the head of a family, and insolvent, of which facts the judgment debtor did not deny he was aware, and that the judgment in question was exempt property, if so claimed; but the debtor, in his answers in garnishment, failed to state any of these facts: Held, that he had not made a full disclosure; in effect, had not acted in good faith with the creditor; and, on a claim by the latter that the judgment was exempt, the payment of the money into court is no protection.—MACE V. HEATH, Neb., 52 N. W. Rep. 822.

46. FEDERAL COURTS — Adopting State Practice.—Act Cong. 1872, requiring federal courts to conform to State practice "as near as may be," only adopts such rules of State practice as are not inconsistent with any act of congress upon the same subject; and hence Code Civil Proc. Kan. § 270, enacting that prior service as a talesman in the same court and term shall be sufficient ground for challenge, is not binding on federal courts, it being otherwise provided by Rev. St. U. S. § 812.—WALKER V. COLLINS, U. S. C. C. of App., 50 Fed. Rep. 737.

47. FEDERAL COURTS—Circuit Court of Appeals—Date of Creation.— Act March 3, 1891, creating circuit courts of appeals, took effect immediately, so as to permit appeals to the new courts to be taken at once. — BALTIMORE & O. R. CO. V. ANDREWS, U. S. C. C. of App., 50 Fed. Rep. 728.

48. FEDERAL COURTS—District Attorneys.—Under Rev. St. § 838, a district attorney who has rendered services in the examination of violations of the internal revenue laws, referred to him by the collector, is entitled to compensation therefor upon a certificate of the judge before whom such cases are triable, although no proceedings may have been instituted.—UNITED STATES v. BASHAW, U. S. C. C. of App., 50 Fed. Rep. 749.

49. FEDERAL COURTS—District Attorneys' Fees.—A district attorney is entitled to mileage for travel by the most convenient and practicable routes in the discharge of his official duties, though such routes are not the shortest routes. — UNITED STATES v. PERRY, U. S. C. C. of App., 50 Fed. Rep. 743.

50. FEDERAL COURTS — Jurisdiction.—Act 1875, § 8 (18 St. p. 472), confers power on the circuit court, in any suit to enforce a lien on property within the district wherein the suit is brought, in which "one or more of the defendants therein shall not be an inhabitant of or found within the said district," to order process against such absent "defendant or defendants:" Held, that the circuit court has jurisdiction of such a suit when the citizenship is diverse, although there is but one defendant and neither party resides within the State in which suit is brought.— WHEELWRIGHT v. ST. LOUIS, N. O. & O. CANAL & TRANSP. CO., U. S. C. C. (La.), 50 Fed. Rep. 709.

51. FRAUDS, STATUTE OF—Pleading.—A complaint on a contract which alleges that the secretary of a school board "willfully and purposely failed and refused" to reduce to writing a contract approved at a certain meeting, employing the plaintiff as teacher from a period commencing at a certain subsequent time, and continuing for a year, but without alleging that defendant fraudulently prevented the reduction of the said contract to writing, is insufficient to take the case out of Rev. (St. 1881, § 4904, requiring such contracts, or some memorandum, to be in writing.—CALDWELL v. SCHOOL CITY OF HUNTINGTON, Ind., 31 N. E. Rep. 566.

52. FRAUDULENT CONVEYANCES. — A sale of land for two-thirds of its value, though made by an insolvent with intent to defraud his creditors, will not be set aside where it appears that the vendee neither participated in the vendor's intent nor knew of his insolvency.—ZICK v. GUEBERT, Ill., 31 N. E. Fed. Rep. 601.

53. GARNISNMENT—Foreign Corporations.—Before the passage of the oppressive garnishment law of 1891, a corporation doing business both in Missouri and in Illinois could be garnished in the latter State upon an indebtedness contracted and payable in Missouri, even though plaintiff and the principal debtor were both residents of Missouri, and though the garnishment proceedings were brought in Illinois for the express purpose of evading the exemption laws of Missouri.—WABASH R. CO. v. DOUGAN, Ill., 31 N. E. Rep. 594.

54. GUARDIAN AND WARD— Estoppel.—Where a guardian has made a final settlement, showing a certain amount due from him to his ward, and such settlement has been approved by the county court, the guardian and his personal representatives are estopped to deny the correctness of such settlement. — KATTELMAN v. GUTHRIE'S ESTATE, Ill., 31 N. E. Rep. 589.

55. INSOLVENCY — Discharge.— A discharge in insolvency releases the insolvent from liability to one who, before the payment of the first dividend in the insolvency proceedings, paid a note which had been given by him and the insolvent jointly, since under the express provisions of Pub. St. ch. 157, § 26, such contingent liability was provable against the insolvent's estate.—RAND v. KING, Mass., 31 N. E. Rep. 650.

56. JUDGMENT— Equity.—Where a married woman allowed judgment to be taken by default on a note to which she might have pleaded coverture, a court of equity will not set aside the judgment.—EVANS v. CALMAN, Mich., 52 N. W. Rep. 787.

57. JUDGMENT AGAINST EXECUTORS.—Pub. St. ch. 189, § 10, providing that, if execution against the estate of a testator be returned *nulla bona*, a writ of *scire facias* may issue against the executor, which being duly served and returned, if he "make default of appearance, or, coming in, shall not show sufficient cause to the contrary," execution shall be awarded against him and his own property as for his own debt, does not permit one who has allowed judgment by default to be taken against him as executor to show at the hearing on the *scire facias* that he had never had property as executor with which to satisfy the claim.—CARVER v. WELLS, R. I., 24 Atl. Rep. 466.

58. JUDICIAL SALE—Title of Purchaser.— A purchaser in good faith under a decree, while it subsisted and was binding on the parties thereto, will not be affected by its reversal for errors or irregularities, provided the court had acquired jurisdiction to pass it, where all necessary parties are before the court.—BENSON v. YELLOTT, Md., 24 Atl. Rep. 451.

59. LANDLORD AND TENANT. — Where rooms on the second floor, and in the front of a building, between which and the street there is a space used, though not dedicated, as a part of the sidewalk, are leased for business purposes, "with all the rights and privileges thereto belonging," there is an implied grant of a right to an obstructed view of the street, and the lessor cannot, by adding to the front of the building, interpose other rooms between the street and those leased —BRANDE v. GRACE, Mass., 31 N. E. Rep. 633.

60. LEASE — Part Performance. — Taking possession under a parol lease of part of the premises, and paying rent for such part, does not take the lease out of the statute of frauds, so as to give the lessee any right to the balance of the premises. — COCHRAN v. WARD, Ind., 31 N. E. Rep. 581.

61. LIBEL—Pleading. — Where, in an action for libel, the answer, taken in connection with the declaration, does not definitely show what defendant intends to prove in justification, it is the duty of plaintiffs to move for a more specific statement, and, failing so to do, they cannot object to evidence given by defendant of the truth of any statement made in the alleged libel. — HOWLAND v GEORGE F. BLAKE MANUF'G CO., Mass., 31 N. E. Rep. 656.

62. MALICIOUS PROSECUTION—Probable Cause.—Where a person places before an experienced attorney all the facts relating to a theft, and asks his advice as to whether such facts would justify an arrest, and the latter then discloses the said facts to the prosecuting attorney, neither the attorney nor the person mentioned can be made liable as for malicious prosecution. —PERRY v. SULIER, Mich., 52 N. W. Rep. 801.

63. MARRIAGE—Annulment.—Where two persons have contracted marriage in good faith, and it is subsequently discovered that the wife had a former husband living at the time of her second marriage, she cannot maintain an action to avoid her second marriage after the death of her second husband.—RAWSON v. RAWSON, Mass., 31 N. E. Rep. 653.

64. MARRIED WOMAN—Contract.—Where the contract of a married woman does not relate to her separate business or estate, she will not be liable as surety on a promissory note, unless it appear that she thereby intended to bind her separate estate.— ECKMAN v. SCOTT, Neb., 52 N. W. Rep. 822.

65. MASTER AND SERVANT — Assumption of Risks. — When one enters upon a service he assums to understand it, and takes all the ordinary risks that are incident to the employment; and where the employment presents special features of danger, such as are plain and obvious, he also assumes the risk of those.—FOLEY v. JERSEY CITY ELECTRIC LIGHT CO., N. J., 24 Atl. Rep. 487.

66. MASTER AND SERVANT— Contributory Negligence. —The mere disregard of an employee of a rule of a railroad company in relation to the coupling of cars, when, with the knowledge and acquiescence of the division superintendent of the road, such employee, and others coming under the rule, have constantly and without exception disregarded it, is not such negligence on the employee's part as will absolutely defeat

his recovery for an injury caused by the negligence of the company. — NORTHERN PAC. R. CO. v. NICKELS, U. S. C. C. of App., 50 Fed. Rep. 718.

67. MASTER AND SERVANT — Dangerous Premises.—In an action by a coal miner against his employer for injuries caused by part of the roof of the mine falling on him, the complaint showed that the plaintiff passed through that part of the mine where the accident occurred when the mine was unlighted, and so dark that he could not see its condition. The complaint also alleged that the accident occurred without fault or negligence on the part of the plaintiff: Held, that the complaint did not show contributory negligence.— PARKE COUNTY COAL CO. v. BARTH, Ind., 31 N. E. Rep. 585.

68. MASTER AND SERVANT — Defective Appliance. — Evidence that a railroad company's "tell-tale," though safe for cars of an ordinary height, was dangerous for brakemen upon cars of a greater height, which have come into use for special purposes, shows a breach of the company's duty to provide its employees with safe appliances, and a danger not manifest or a risk ordinarily incident to a brakeman's employment. — DARLING v. NEW YORK, P. & B. R. CO., R. I., 24 Atl. Rep. 62.

69. MASTER AND SERVANT—Proximate Cause.—A yard switchman in uncoupling cars was walking or running with the train, for the purpose of lifting the pin, when he stumbled over a piece of coke on the track, and his arm was thrown between the deadwoods and injured: Held, that the stumbling was the proximate cause of the injury, and evidence as to the defective condition of the draw-bar was immaterial.—CINCINNATI, N. O. & T. P. RY. CO. v. MEALER, U. S. C. C. of App., 50 Fed. Rep. 725.

70. MECHANIC'S LIEN — Architect.—An architect is within the protection of Code, § 3018, as a person who has done "work or labor upon a building or improvement on land."—HUGHES v. TORGERSON, Ala., 11 South. Rep. 209.

71. MECHANIC'S LIENS—Assignment.—A valid equitable assignment may be made of a portion of the contract price of a building contracted to be erected by the assignor, but not yet erected, and such assignment need not be written nor accompanied by any transfer of the contract itself.—LANIGAN'S ADM'R. v. BRADLEY & CURRIER CO., N. J., 24 Atl. Rep. 505.

72. MORTGAGE—Appointment of Receiver.—Averments in a bill by a mortgagee against a mortgagor showing default in payment of the debt at maturity; that the mortgagor had in bad faith sold the mortgaged property; that the vendee refused to attorn and deliver up possession to the mortgagee; that the mortgagor and vendee were both insolvent; that the vendee had removed a portion of the crops, and there was danger of further loss of crops; and that the security was inadequate—show a *prima facie* case, and justify the appointment of a receiver on an *ex parte* application without notice where a bond of indemnity is given.—HENDRIX v. AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, LIMITED, Ala., 11 South. Rep. 213.

73. MORTGAGE — Foreclosure. — The equities of two junior incumbrancers as between themselves may be adjusted in an action of foreclosure to which they are both parties defendant.—NORWOOD v. NORWOOD, S. Car., 15 S. E. Rep. 382.

74. MORTGAGES — Foreclosure Sales.—Plaintiffs held two judgments against one W. Defendant had a mortgage on land of W, on which said judgments were liens, and obtained a judgment and foreclosure of the mortgage, and sold the land on a decree in the foreclosure suit, defendant becoming the purchaser. In a suit by plaintiffs to redeem, it was held that, as against one of plaintiff's judgments, only part of defendant's judgment was a prior lien, and they were permitted to redeem from the sale for that amount: Held that, as against plaintiffs, defendant might thereafter have foreclosure for the unsatisfied part of her judgment, subject to plaintiff's first judgment, and the amount they had paid to redeem from defendant.—EWING v. BRATTON, Ind., 31 N. E. Rep. 562.

75. MORTGAGE—Redemption.—A bill to have a deed absolute on its face declared a mortgage will not lie after the right to foreclose is barred by the statute of limitations, since the right to redeem and the right to foreclose are reciprocal.—GREEN v. CAPPS, Ill., 31 N. E. Rep. 597.

76. MORTGAGES—Tenants in Common.—A and B, tenants in common, executed a mortgage on the common property to secure a debt due by B. A died, leaving her interest in the property to C, who filed a bill to enjoin the sale of the property, alleging that the property had been divided between A and B, and that B's share was of sufficient value to pay the whole debt: Held, that the bill was demurrable in failing to show a partition of the mortgaged premises by recorded conveyance.—EVANS v. FIELDS, Miss., 11 South. Rep. 224.

77. MORTGAGE LIEN—Priorities.—The record of a deed after 40 days from date, taken to secure pre-existing debts by the grantee, who had acquired knowledge of a prior unrecorded mortgage thereon for value and recorded his conveyance, gives no priority over the mortgage; the sole value of the record being, as provided in Gen. St. § 1776, to give notice to subsequent creditors and purchasers for value without notice, such notice to take effect from date of record, if the record dates 40 days after execution or delivery.—SUMMERS v. BRICE, S. Car., 15 S. E. Rep. 374.

78. MORTGAGES OF CO-TENANT.—The lien of one holding a mortgage upon the undivided interest of a tenant in common in certain land is not affected by a sale of land in partition, but becomes, under section 3247 of the Code, a charge upon the share assigned to the mortgagor.—ESPALLA v. TOUART, Ala., 11 South. Rep. 219.

79. MUNICIPAL CORPORATION—Commissioners—Qualifications.—When a city charter requires commissioners of certain qualifications to be appointed for a special object, it must appear on the face of the proceedings that they possessed, or were deemed to possess, such qualifications.—VREELAND v. MAYOR, ETC., N. J., 24 Atl. Rep. 486.

80. MUNICIPAL CORPORATION—Condemning Waters.—Under Const. art. 11, § 6, providing that all cities shall be controlled by general laws; and Civil Code, § 1001, and Code Civil Proc. § 1238, providing that any person may by exercise of eminent domain acquire private property for the use of "canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants" of any city,—a city, though not authorized by its charter so to do, may condemn the waters of a creek for the use of its inhabitants.—CITY OF SANTA CRUZ v. ENRIGHT, Cal., 30 Pac. Rep. 197.

81. MUNICIPAL CORPORATION—Designation of Depository.—Moneys paid to the city treasurer under the provisions of section 189 of the first-class city act are city funds, or, in other words, funds belonging to a city. And for the purpose of designating a bank as a depository for them they are under the control of the mayor and council; but when they are deposited in the bank designated by the mayor and council, they are still subject to the order of the board of police commissioners to the same extent as they were when they were held by the city treasurer.—INTERSTATE NAT BANK v. FERGUSON, Kan., 30 Pac. Rep. 237.

82. MUNICIPAL CORPORATION—Street Improvement.—An ordinance of a municipal corporation to condemn property for the opening and extension of a street, or to improve, by grading, curbing and macadamizing, a street so opened and extended, is an ordinance of a permanent nature within the meaning of section 1694 of the Revised Statutes.—CAMPBELL v. CITY OF CINCINNATI, Ohio, 31 N. E. Rep. 606.

83. MUNICIPAL CORPORATIONS—Nuisance.—Under St. 1891, ch. 220, § 1, inhibiting the erection of stables without a license of the board of health, the determination of the natural and probable effect of such erection is a question for the board of health, the decision of which, in

granting a license, is conclusive until at least a building has been erected and a nuisance actually created.—WHITE v. KENNY, Mass., 31 N. E. Rep. 654.

84. MUNICIPAL CORPORATIONS—Vacation of Streets.—The common council of the city of Elizabeth had the power, by ordinances passed in 1891, to vacate a portion of York street, said street having been laid out by the common council, not by the board of commissioners to lay out streets.—STATE v. CITY OF ELIZABETH, N. J., 24 Atl. Rep. 496.

85. MUNICIPAL IMPROVEMENTS — Powers of Borough Council.—The council of a borough organized under "An act for the formation and government of boroughs" (P. L. 1890, p. 58), has no right to enter into a contract by which the public moneys are to be expended, and borough bonds are to be issued, to pay for grading and filling a street, unless such grading and filling have been directed to be done by an ordinance.—STATE v. MAYOR, ETC., N. J., 24 Atl. Rep. 481.

86. MUTUAL BENEFIT SOCIETIES—Illegal Expulsion — Although a mutual benefit society cannot be heard to say that no damage is done by the illegal expulsion of a member because it is void *ab initio*, yet an action cannot be brought to recover damages therefor, since *mandamus* lies to compel his reinstatement, by waiving which remedy and suing for damages the expulsion is recognized as legal, and because the elements of damages are too uncertain, and ordinarily such society has no funds except such as are held in trust for the benefit of the members, which cannot be applied to other purposes.—LAVALLE v. SOCIETE ST. JEAN BAPTISTE DE WOONSOCKET, R. I., 24 Atl. Rep. 467.

87. NATIONAL BANK — Limitation of Indebtedness.—Rev. St. § 5202, providing that national banks shall not contract liabilities in excess of their paid-up capital stock, except upon notes of circulation, accounts for deposits, etc., does not intend that such items of liability shall be excluded in determining whether the indebtedness of a bank exceeds its paid-up capital stock at the time it incurs a liability as guarantor.—WEBER v. SPOKANE NAT. BANK, U. S. C. C. (Wash.), 50 Fed. Rep. 735.

88. NEGLIGENCE.—Where plaintiff in an action for personal injuries attempted to cross a street behind a high loaded wagon, and was run over by defendant's team, going in the opposite direction, the court cannot say as a matter of law that plaintiff was negligent in not waiting until the loaded wagon had passed far enough to enable him to see that no other team was coming from behind it on the other side; but the question of negligence, in such case, is for the jury.—PURTELL v. JORDAN, Mass., 31 N. E. Rep. 652.

89. PARTNERSHIP.—What a partnership is, is a question of law. Its existence in the given case, however, is a question of fact depending for its solution upon inferences to be drawn from the evidence adduced.—HURD v. TOMKINS, Colo., 30 Pac. Rep. 247.

90. PARTNERSHIP—Accounting.—Where two partners invest unequal amounts in the firm business, in the absence of agreement the one investing the greater amount is not chargeable on an accounting with taxes on the excess of his investment over that of the other.—CONN v. CONN, Oreg., 30 Pac. Rep. 230.

91. PARTNERSHIP — Death of Partner.—Where a debt has been contracted by a partnership in the firm name, and one of the partners thereafter dies, the debt continues as a charge against the surviving partner, and it need not be filed as a charge against the estate of the deceased partner.—WRIGHT v. BARTON, Neb., 52 N. W. Rep. 809.

92. PARTNERSHIP—Interests in Profits.—Where a person, with his knowledge and consent, has been held out to the person having a claim, or to third parties, as a partner, liability as a partner is fastened upon him. A secret and unauthorized holding out, however, will not have this effect, unless as the result of a subsequent ratification.—BUTLER v. HINCKLEY, Colo., 30 Pac. Rep. 250.

93. PARTNERSHIP—Survivor.—A sole surviving partner is entitled to possession of the firm's assets until its affairs are settled, as against an executrix and sole legatee of his deceased partners.—HAWKINS v. CAPRON, R. I., 24 Atl. Rep. 466.

94. PLEADING — Amendment. — Where, in an action against a railroad company for causing the death of an employee, the original petition proceeds entirely on the ground of the company's negligence in employing an engineer of known incompetence, an amendment which claims on the ground of the engineer's negligence merely, introduces a new cause of action, and does not relate back to the filing of the original petition, so as to escape the bar of the one-year limitation prescribed by Rev. St. Mo. § 4429.—SMITH v. MISSOURI PAC. RY. CO., U. S. C. C. (Mo.), 50 Fed. Rep. 760.

95. PRESUMPTION—Right of Way.—Where a right of way by prescription is claimed, acts of user on which such claim rests cannot be referred to a right of way by necessity which was lost over 60 years before, and the existence and loss of which it does not appear were known to either of the parties or their predecessors in interest.—BALLARD v. DEMMON, Mass., 31 N. E. Rep. 635.

96. PROCESS — Service on Foreign Corporation. — Where a foreign corporation contracts a debt in this this State as for labor and materials, service in this State upon the managing agent is sufficient, although he be but temporarily within in the State.—KLOPP v. CRESTON CITY GUARANTEE WATER WORKS CO., Neb., 52 N. W. Rep. 819.

97. QUIETING TITLE—Possession. — Where a deed or other instrument of writing exists, apparently valid on its face, but in fact invalid, and which may be vexatiously or injuriously used after the evidence to impeach it is lost, or which may throw a cloud over com plainant's title, and he cannot, being in possession, establish his right by any course of proceeding at law, a court of equity will afford him relief; but where his title is legal in its nature he must be in possession before he can invoke the aid of a court of equity to remove a cloud from his title.—PATTON v. CRUMPLER, Fla., 11 South. Rep. 225.

98. RAILROAD COMPANIES — Assumption of Risk.—A brakeman employed by a railroad company to couple cars on its railroad assumes the hazards of the ordinary perils which are incidental to such employment, and in a suit by such brakeman against the company to recover damages for injuries received in attempting to couple cars on account of alleged negligence in loading a car to be coupled, and in negligently accepting a car to be coupled when the same was in an unsafe condition, a charge of the court to the jury that excludes the right to consider such a coupling as coming within the ordinary hazards and risks of his employment is erroneous.—JACKSONVILLE, T. & K. W. RY. CO. v. GALVIN, Fla., 11 South. Rep. 231.

99. RAILROAD COMPANIES—Assumption of Risk.—The servant of a railway company, employed in the work of construction, assumes greater risks from a defective track than one passing back and forth over the line after its full completion and equipment. But he has a right to expect a degree of care and skill equal to that ordinarily exercised during the progress of railroad construction.—COLORADO MIDLAND RY. CO. v. NAYLON, Colo., 30 Pac. Rep. 249.

100. RAILROAD COMPANIES—Death of Employee.—In an action against a railroad company for the negligent killing of an employee, where there is an entire absence of evidence of what deceased was doing at the time of the accident, it is not enough to show that one conjecture in regard thereto is more probable than another, as there must be some evidence to show that he was in the exercise of due care, in order to justify a recovery.—TYNDALE v. OLD COLONY R. CO., Mass., 31 N. E. Rep. 655.

101. RAILROAD COMPANIES—Negligence.—The occupation of a street crossing by railroad engines, without

authority of law, constitutes negligence *per se* on the part of the railroad company.—DENVER, T. & G. R. Co. v. ROBBINS, Colo., 30 Pac. Rep. 261.

102. RAILROAD COMPANIES — Street Railway—Negligence.—When one duty of the driver of a horse car was to collect the fare from passengers, it was erroneous to charge that the jury, in determining the care exercised by the driver at the time of a collision, might consider the fact that one of his duties was the collection of fares, when the evidence was uncontradicted that at the time in question there were no passengers from whom to collect fares.—SHEETS v. CONNOLLY, ST. RY. Co., N. J., 24 Atl. Rep. 483.

103. RAILROAD COMPANIES—Street Railroads—Transfer Tickts.—Where a street railroad which is not obligated by its charter, or the ordinances of the city, to give transfer tickets from one line to another, and which does not hold out to the public that it will do so, gives a transfer conditioned upon its face for use within a certain time, the transfer must be used within that time, or it will be void.—HEFFRON v. DETROIT CITY RAILWAY, Mich., 52 N. W. Rep. 802.

104. RAILWAY COMPANIES—Contributory Negligence.—In an action against a railroad company for the death of plaintiff's intestate, a yard switchman of defendant, a complaint alleging that in a side track where deceased was engaged there was a defective rail, the defect consisting of a sliver which extended outward along the rail; that deceased, while going to couple certain cars, one of which was in motion, through no fault of his own, stepped on the sliver and was there held fast until run over by the moving car, is not demurrable on the ground that it shows deceased to have been guilty of contributory negligence in not seeing the sliver.—LAKE ERIE & W. R. Co. v. MUGG, Ind., 31 N. E, Rep. 564.

105. REMOVAL OF CAUSES.—The filing of the petition for removal of a cause from a State to a federal court is no waiver of an objection that the State court was without jurisdiction of the cause for want of personal service of process, and of a *res* to support service by publication.—AHLHAUSER v. BUTLER, U. S. C. C (Wis.), 50 Fed. Rep. 705.

106. REPLEVIN BOND — Parties. — Where a replevin bond is made payable to the coroner "and to his successors in office, executors, administrators, and assigns," the coroner may bring suit thereon in his own name after the expiration of his term of office, since under Rev. St. 1874, ch. 119, § 25, which authorizes the officer to whom a replevin bond is given to sue thereon if at any time the condition of the bond is broken, the successor of the officer has no right to sue on the bond. —SCHOTT v. YOUREE, Ill., 31 N. E. Rep. 591.

107. RIPARIAN RIGHTS—Island.—Where the mainland on both sides of a stream and an island dividing the stream have been surveyed and sold by the government as separate parcels, the *filum aquæ* is established in the center of the channels on both sides of the island, between it and the mainland, as though two distinct streams existed; and where the owner of the island also owns the mainland on one side of the stream, for hydraulic purposes he is entitled to the use of the entire natural flow of water in the channel on the side of the island on which he owns the mainland, and one-half of the flow in the opposite channel.—WEST v. FOX RIVER PAPER CO., Wis., 52 N. W. Rep. 803.

108. SALE — Broker's Commission. —Where owners of part of the capital stock of a quarry authorize a broker to sell part of their stock, and he procures a purchaser able and willing to buy on their terms, and they know it, their liability for the broker's commission is fixed, and is not altered by the fact that instead of closing the sale made by him they make another of the same stock to different parties. — OWL CANON GYPSUM CO. v. FERGUSON, Colo., 30 Pac. Rep. 255.

109. SALE— Warranty. — A statement of the seller alleged as a warranty should be pleaded as an undertaking made by him as part of the contract of sale, with intent that it should be relied on, and that it induced, or was in consideration of the purchase.—LINCOLN v. RAGSDALE, Ind., 31 N. E. Rep. 581.

110. SCHOOL DISTRICT BONDS—Contest of Election.—The term "municipal corporation," as used in chapter 79 of the Laws of 1871, does not embrace school districts; and a school-district election to vote bonds cannot be contested, at the instance of an aggrieved elector, by any of the proceedings provided for in that act. FREELAND, v. STILLMAN, Kan., 30 Pac. Rep. 235.

111. SLANDER — Evidence. — In an action for slander, evidence of the number and ages of plaintiff's children is competent, since she is entitled to damages for mental suffering, and such suffering may have been increased by the fear that her family would suffer by reason of the slander; but evidence that the children are dependent on her for support is inadmissible. — CAHILL v. MURPHY, Cal., 30 Pac. Rep. 195.

112. TAXATION — Exemption. — A corporation of this State, which, by contract with another corporation located here, gives to it the exclusive right to make phonographs, and takes all made at the cost of materials and labor, with a percentage for profits and depreciation, having also an office, and a factory where parts of the phonographs are made, within this State, is a "manufacturing company carrying on business in this State," and exempt from State taxes, under the act of April 18, 1884.—STATE v. STATE BOARD OF ASSESSORS, N. J., 24 Atl. Rep. 507.

113. TOWNS—Bonds. — Under Const. art. 13, § 1, a town cannot issue bonds to procure funds with which to rebuild a school-house, where the bonds, if issued, will create an indebtedness in excess of 2 per cent. of the taxable value of the property within the town limits.—TOWN OF WINAMAC v. HUDDLESTON, Ind., 31 N. E. Rep. 561.

114. TRESPASS — Damages.—Where a trespass is committed by the building of a dam and the digging of a trench on plaintiff's premises, they can recover the expense of removing the dam, filling the trench, and restoring the premises to their former condition, together with the amount of their loss caused by inability to make use of the premises during the time this would reasonably require.—CAVANAGH v. DURGIN, Mass., 31 N. E. Rep. 643.

115. TRESPASS — Negligence of Contractor. — Where plaintiff sustains damage by the dropping of a mortar and bricks during the erection of a wall next to the premises occupied by her, defendant, for whom the wall was being erected, is not liable for such damage if it was not a necessary result of the building of the wall, but was caused by the negligence of his contractor or of the contractor's servant.— PYE v. FAXON, Mass., 31 N. E. Rep. 640.

116. UNION DEPOT COMPANIES— Condemning Land.— How. St. ch. 93, § 10, provides that on the report of the commissioners or jury appointed by a court of record to ascertain the damages sustained by the owners of real estate taken by union depot companies, the court, on motion, shall confirm the same, unless for good cause shown by either party; and "said court, as to the confirmation of such report, shall have the powers usual in other cases:" Held, that the circuit court was not thereby limited to rejection of the report for defects of jurisdiction. — FORT STREET UNION DEPOT CO. v. BACKUS, Mich., 52 N. W. Rep. 791.

117. VENDOR AND PURCHASER — Purchase Money.—A purchaser of land is entitled to recover back the money paid by him, where all the payments have been made, and seven months have elapsed since the last payment on one bond, and nearly a month since the last on another, and a mortgage on the premises has not been paid or released. — KIMBALL v. BELL, Kan., 30 Pac. Rep. 240.

118. WATER-COURSES— Diversion—Prescription.—Acts Cong. July 1, 1862, and July 2, 1864, granting sections of land to a railroad company in aid of the construction

of its road, passed the legal title thereto upon the identification of the land by the survey and location of the road as of the date of the grant, rather than of the issuance of the patent, and consequently the title to land purchased from the company after the issuance of the patent in 1884 was not in the United States in 1874, and by a diversion of water running through it, commenced in the latter year, and continued for the statutory period, a prescriptive right to divert the same was acquired.—JATUNN V. SMITH, Cal., 30 Pac. Rep. 200.

119. WILL — Description of Devisees. — Testator left surviving him a son and a daughter, by his first wife, M, neither of whom lived with testator, and of whom the son was married and had two children, who lived with him. Testator also left surviving him his second wife, E, and a son by this wife who was unmarried, and lived at home. The will provided that the residue of the estate should be "equally divided between the families of" testator's two wives: Held, that the intention of the testator was to divide the residue of the estate equally between the families by his two wives, as constituting two classes of distributees, each family constituting a class, and that the grandchildren did not share in the distribution.—TOWNSEND V. TOWNSEND, Mass., 31 N. E. Rep. 632.

120. WILLS—Nature of Estate.— A testator devised to his daughter and her heirs certain land, but, if the daughter should "die without heirs," then the testator's brother and sister, share and share alike, and, in the event of their death, then to their children, respectively: Held, that the contingency provided for at the death of the daughter was not, an indefinite failure of issue, but a failure merely at the death of the daughter; and the devise, therefore, was to be upheld, under Code 1888, art. 93, § 317, declaring that where words are used which are capable of either of the said meanings they are to be given the latter meaning.— LEDNUM V. CECIL, Md., 24 Atl. Rep. 452.

121. WILLS—Parol Evidence.— Testator devised to his wife for life "the house and lot on which I now reside, being parts of lots numbered 15 and 16," etc. By another clause, "the same lot, numbered 15, so devised to my said wife," "with all the appurtenances thereto belonging," was devised to his daughter in fee: Held that, as said property was not otherwise disposed of by will, it was the evident intent of testator to devise "parts of lots 15 and 16" to the daughter, and the admission of parol evidence to show that testator intended that all of the property on which he resided should go to his daughter, if error, was harmless.— GROVES V. CULP, Ind., 31 N. E. Rep. 569.

122. WILLS — Powers of Sale. — Where land was conveyed to a church in trust, with power to sell with the consent of the "session," such consent will be presumed from lapse of time, when, 25 years after the church deeded it, one who has made a contract to purchase from the church's grantee objects to his title.— BREDENBURG V. BARDIN, S. Car., 15 S. E. Rep. 372.

123. WILLS—Undue Influence.— Where grandchildren of testatrix, who received no substantial benefits, contested the will on the ground of undue influence exercised by testatrix's children, who were beneficiaries, and the evidence showed that affectionate relations existed between testatrix and contestants, for the purpose of showing that the exclusion of contestants from any substantial benefits under the will was not unnatural, it was proper for proponents to show that contestants had property of their own. — EASTIS V. MONTGOMERY, Ala., 11 South. Rep. 204.

124. WITNESS—Impeachment.—The evidence of plaintiff's son in an action to determine the right to a share of a certain "ditch" waters, that his father used water on his land during a certain year, and his denial on cross-examination of an alleged statement by him to a third person that the wheat raised that year was dry wheat, cannot be contradicted by evidence of a third person, and it was not error to refuse to allow a similar contradiction of his denial on cross-examination of an alleged statement by him that the plaintiff had an interest in the "ditch" at one time, but had not kept up the assessments, such statement being immaterial. — ROGERS V. COOK, Utah, 30 Pac. Rep. 284.

125. WITNESS — Partnership — Cross-examination. — Plaintiff and defendant were partners. Plaintiff sold his interest in their business to defendant. In an action for the balance due on such sale defendant alleged that plaintiff, whose business it was to state an account, omitted in such statement an indebteddess of the firm. In the deposition of plaintiff it was asked him on cross-examination how he ascertained the indebtedness of the firm, and he answered that it was ascertained from the firm books: Held not proper cross-examination.—CHRISTIE V. HENLEY, Ind., 31 N. E. Rep. 579.

ABSTRACT OF DECISIONS OF MISSOURI COURTS OF APPEAL.

KANSAS CITY COURT OF APPEALS.

ACTIONS—Deemed Commenced, When.—In an action to enforce a mechanic's lien, the only question was whether suit was commenced within ninety days after lien was filed, the petition having been filed within ninety days, and the clerk directed at time of filing petition to issue summons thereon. The clerk failed to issue summons until after the ninety days had expired: Held, that under Sec. 2013, R. S., 1889, a suit cannot be deemed commenced until the filing of a petition and suing out of process thereon. Secs. 6136, and 2013, being in *pari materia*, should be used to explain the scope of each other. Viewed in this way the words, "suing out process" should be construed to mean the delivery thereof to the sheriff or other officer authorized to execute the same.— K. C. HYDRAULIC PRESS BRICK CO. V. BAKER.

ADMINISTRATION NOT NECESSARY, WHEN. — Where there are no creditors and the heirs of the deceased are of age, an administrator would be a mere naked trustee, and it would seem idle, as well as a waste of the estate, to go through the form and expense of administration against the will of the heirs, as evidenced by their settlement and distribution of the property among themselves. When, under such circumstances a settlement and domestic distribution is made without fraud, or mistake, there is no necessity for administration and none should be granted. Both the administrator and the heirs would be estopped from disputing such a settlement and distribution.— MCCRACKEN V. MCCASLIN.

CHATTEL MORTGAGE—Validity.—A parol agreement in the nature of a chattel mortgage is effective between the parties thereto and before the informality or legal insufficiency of the execution of a chattel mortgage can be alleged by one not a party to the transaction, he must show some right to question the same, as, for instance, the right of a creditor or purchaser. A trespasser, or wrong-doer, cannot invoke the aid of the statute.—THE CARROLL EXCHANGE BANK V. THE FIRST NAT. BANK OF CARROLLTON.

CHECK—Cash Payment—Replevin.—In an action of replevin of cars of grain: Held, where no time is stipulated by the contract of sale for payment of the purchase price, its payment is a condition precedent implied by law, and the property does not vest in the vendee until he performs the condition, unless the seller waives it. A check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment, arising from the fact that he accepts it from his debtor. If the check, on due presentation, is dishonored, the seller may retake his goods.—HALL V. THE MO. PAC. RY. CO.

CITY STREETS—Dedication.—In an action for personal injuries received by reason of a defective sidewalk: Held, it is not necessary to prove any formal dedication of a street before the municipality is bound to

keep it in repair. It was enough to show that it was in the actual possession of the city and public and used as a street.—SCHENEK V. THE CITY OF BUTLER.

CONTRACT—Attorney's Fee.—In a suit for attorneys fees on the following verbal contract: The defendant being sued in ejectment "employed plaintiffs herein jointly to defend him against said suit, and contracted, promised and agreed with the plaintiffs to pay them the sum of $300 for their services in defending said suit, providing they gained the same." Plaintiffs entered upon the performance of the contract by advising defendant as to his case and by filing an answer in the cause. Before the trial term, and in vacation, the suit was dismissed by the plaintiff: Held, under the circumstances of this case, that plaintiffs "gained" the suit in the sense of the contract.—MOSS V. RICHIE.

CONTRACT—Failure of Consideration.—If an article prove wholly worthless for the particular purpose for which it was ordered and intended by the vendor and vendee, and totally useless for any purpose whatever, no recovery can be had in an action for the purchase price.—JOHNSON V. SPROULL.

CONTRACTS—Filling Blanks In—Agency.—The rule of law is now well settled that the leaving of blanks in a contract, and the delivery of the instrument with such blanks, create an agency in the receiver and his assigns to fill the blanks in the way contemplated by the maker. But the agency is limited, and any departure from the agreement will defeat the right of the original holder to recover on the instrument.—MACKEY V. BASEL.

CONTRACT—Illegal Consideration.—In an action for the purchase price agreed to be paid for a mining shaft, with license to take mineral in adjacent lots, the shaft having been sunk within the lines of a public street in a city: Held, the plaintiffs by entering upon the street and making the excavation committed an indictable offense; that such an excavation was not property in any sense of the word, could not be the subject of barter and sale, and could not form the consideration for a promise to pay money; that the contract involved the maintenance of an illegal obstruction in the street, and was therefore void because intending the performance of an unlawful act, and being indivisible the entire contract is void.—FRIEND V. PORTER.

CONVEYANCES—Crop Passes with the Land, When.—L gave a deed of trust on land to C, and afterwards leased the land to V, who raised thereon a crop of corn. During the term of the lease the land was sold under the deed of trust. In an action of replevin for the corn, plaintiff claimed it because he raised it; defendant claimed it because he bought it at a foreclosure sale of the land on which it was grown, and when the corn was still standing in the stalk in the field: Held, that plaintiff's rights are just what his lessor's would have been had he retained the land and had this crop thereon at the foreclosure sale, and that the crop of corn standing on the land, matured but not severed, passed with the sale and conveyance of the land. The test is, has the crop been severed, or cut loose, from the soil; not, whether it has matured.—VOGT V. CUNNINGHAM.

GUARDIAN AND CURATOR — Bond—Sureties. — Under Secs. 2592 and 2593, R. S. 1879, a guardian and curator is liable on his general bond for default arising out of the sale of the ward's real estate for re-investment. Prior to the revision of 1879, the security for such a fund was a special bond required for that purpose of the guardian. Notwithstanding money may have been misappropriated by the guardian before the execution of the bond sued on, which was the second bond, yet, such sum was carried forward and made up a part of the balance adjudged against him in his final settlement, and his failure to pay the same occurred during the existence of the latter bond and is a breach thereof. The settlement a guardian makes upon his resignation or removal is his final settlement, and as such is conclusive upon him and his sureties, and as to them has the same force and effect as if it were a final settlement of the estate.—STATE V. BILBY.

JURISDICTION—Courts of Law and Equity.—In an action on a foreign decree for alimony in arrear: Held, an action at law can be maintained in a court of general jurisdiction in this State, upon a duly authenticated copy of the record of a decree for divorce, and alimony, rendered in a court of competent jurisdiction in another State. The alimony decreed is as much a debt of record as any other judgment for money, and is proved by the record. Such a decree is in effect as much a judgment as if rendered on the common-law side of the court.—BRISBAINE V. DOBSON.

JUSTICE COURT—Statement.—A statement filed in suit before a justice of the peace alleged that, "the defendants are indebted to plaintiff in the sum of $10 for work and labor done as a coal miner during the months of February and March, 1890:" Held, sufficient to advise the defendants of what they sued for, and definite enough to bar another action for the same matter, which is all that is required.—JOHNSON V. LOOMAS & SNIVELY.

LANDLORD'S LIEN—Waived.—A landlord does not, *ipso facto*, waive his lien on the crop for the rent agreed to be paid by taking a note therefor signed by the lessees and another as surety. The taking of such a note is, at most, only a presumptive discharge of the lien, subject to become overcome by other proof.—GARSH V. GOOD.

MATERIAL-MAN'S LIEN — Building Constructed by Owners.—Under Sec. 6705, R. S., where an owner of two or more contiguous lots purchases the material for the construction of separate buildings thereon, where the buildings are not constructed under contract, but by the owner himself, each lot and building are to be separately charged only for the material furnished, or labor performed, to or upon that particular lot and building, and separate and distinct accounts for the liens must be filed against each lot and building.—DEARDORFF V. ROY.

PARTNERSHIP.—In a suit on a promissory note purporting to have been executed by a partnership: Held, the rule is that the question whether persons are partners or not, as to each other, is to be determined by their intention as the latter is expressed by the words of their contract, or gathered from the acts and circumstances attending such contract. The contract in question clearly negatives the contention that it was the intention of the parties thereto to create a partnership relation.—BANK OF OSCEOLA V. OUTHWAITE.

PROMISSORY NOTE — Consideration — Quitclaim.—A quitclaim deed to land is a good consideration for a note, whether any title passes by the deed or not. A creditor does not discharge a surety by failing to collect a judgment obtained against his principal which he could have collected by process, or by diligence. Inactivity or failure of the creditor to exert himself to collect will not discharge the surety.—PHOENIX MUTUAL INS. CO. V. LANDIS.

STATUTE OF LIMITATION—New Promise.—A written acknowledgment, of debt, barred by statute of limitations, made to a stranger, will not affect the statute, unless it was the intention of the debtor that such acknowledgment should be communicated to the creditor; and, if such acknowledgment be made to an agent, such agency must be known to the debtor.—WILLIAMSON V. WILLIAMSON.

UNLAWFUL DETAINER—Actual Possession.—In an action for unlawful detainer: Held, the plaintiff must have had actual possession of the land before he can complain in this form of action, but it is not necessary that he should himself, or by his agents, actually stand upon the land constantly. The fact that he had gone into peaceable occupancy of the land, repaired fences, plowed the land, sowed flax, nailed up the doors and windows of the house; in short, exercised the usual acts of dominion and control over the land and premises, clearly shows that he was in the actual possession contemplated by the statute.—SCOTT V. ALLENBAUGH.